No. 81 5962

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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SUPREME COURT, U.S.

NORRIS CARLTON TAYLOR

Petitioner,

-v-

STATE OF NORTH CAROLINA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

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QUESTIONS PRESENTED

1. Whether the use at the sentencing phase of a capital trial of reports prepared by a state psychiatrist pursuant to court-ordered competency examinations, based on interviews with a defendant without warning that his statements would be used against him, violated the Fifth Amendment?

Whether the use by the State of reports, prepared by a non-testifying state psychiatrist from court-ordered competency examinations, during cross-examination of a defense expert in the penalty phase of a capital trial violated the Sixth Amendment?

2. Whether the refusal to require a jury to specify which mitigating circumstances it found violated the Eighth and Fourteenth Amendments?

3. Whether petitioner's death sentence has been upheld in violation of his Eighth and Fourteenth Amendment rights because it was based upon erroneously submitted aggravating evidence?

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Petitioner Norris Carlton Taylor respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at _____N.C._____, 283 S.E.2d 761 (1981), and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on November 3, 1981. Petitions for rehearing in criminal cases to the Supreme Court of North Carolina are not allowed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> " No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;"

the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> " In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense;"

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> " Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States,which provides in relevant part:

> " [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner Norris Carlton Taylor was convicted and sentenced to death by a New Hanover County, North Carolina jury in July of 1979, for the murder of Mildred Murchison.

On September 1, 1978, petitioner Norris Carlton Taylor was arrested and charged with the murder of Mildred Murchison in Fayetteville, North Carolina. (R. 10). On September 5, 1978, petitioner was judicially determined to be indigent and counsel was appointed to represent him. (R. 1). On January 8, 1979, appointed counsel petitioned the court to have petitioner evaluated for competency to stand trial, and the court ordered the petitioner to be transported to the state psychiatric hospital for such evaluation. Dr. Bob Rollins, Chief of Forensic Psychiatric Services for the State, conducted the initial evaluation. Petitioner's evaluation was

then interrupted for his return to court for other proceedings in connection with the case. Later, on February 6, 1979, pursuant to appointed counsel's motion, petitioner was returned to the state hospital to complete the competency evaluation, which was again conducted by Dr. Rollins. A written report of evaluation and findings based on both evaluations was prepared and mailed to defense counsel pursuant to the court's order. Dr. Rollins then sent a letter to the court reporting his finding that the defendant was competent to stand trial.

On May 28, 1979, petitioner was brought to trial in New Hanover County, North Carolina, pursuant to a change of venue order, for the murder of Mildred Murchison in Fayetteville, North Carolina. (R. 1). The State presented evidence to show that on September 1, 1978, in Fayetteville, North Carolina, the petitioner approached Mildred Murchison in the parking lot of the Social Security Office and demanded her pocket book and the keys to her automobile. (R. 168-169). Evidence further showed that Mrs. Murchison resisted, petitioner shot her, took her automobile, and immediately drove away. (R. 169, 174, 176-178). Later that day, petitioner was arrested in Northampton County, North Carolina, and made statements to law enforcement authorities confessing that he had shot Mrs. Murchison. (R. 233, 235-239, 257-258).

Just prior to the State's resting of its case in the guilt or innocence phase of the trial, upon motion of petitioner's counsel, the court held a hearing as to the petitioner's competency to stand trial outside the presence of the jury. Dr. Bob Rollins was called as a witness by the court. (R. 268). At that point, the District Attorney made a request of the court that Dr. Rollins' reports based on the two previously mentioned competency evaluations be turned over to the State. (R. 268). Defense counsel objected to the District Attorney being provided copies of those reports, explaining that the orders to have the petitioner evaluated by Dr. Rollins had been issued at the request of defense counsel to determine the petitioner's competency to stand trial, to determine if there was the possibility

of the defense of insanity, and to explore any possible mitigating circumstances that would be helpful in preparation of the defense of the case. (R. 268-269). Defense counsel specifically objected to the District Attorney being given access to these reports on the ground of physician/patient privilege extending through the attorney/client privilege, the Fifth Amendment to the United States Constitution, and the Sixth Amendment to the United States Constitution. (R. 269). The court overruled defense counsel's objection and ordered Dr. Rollins' report turned over to the District Attorney at that time. The court explained at that point:

> " Now, this court has the right, this court has the duty to inquire. I asked the District Attorney to get Dr. Rollins down here. I will hear from Dr. Rollins." (R. 269).

Defense counsel then asked that Dr. Rollins' testimony be limited to the results of his findings as to competency and asked that any acts and any statements made by the petitioner to Dr. Rollins not be disclosed. The court overruled this objection. (R. 270). Dr. Rollins then testified outside the presence of the jury that based upon his examinations of petitioner in January and February of 1979 at the state psychiatric hospital and at Central Prison and again on that morning, it was his opinion that the petitioner was competent to stand trial. His full reports as to his findings were turned over to the District Attorney upon order of the court. (R. 270). The State then rested its case.

The defense offered no evidence and petitioner was convicted of felony murder pursuant to N.C.G.S. 14-17, with the underlying felony to support the murder conviction being robbery with a dangerous weapon. (R. 294-295).

Shortly thereafter, a sentencing hearing to determine punishment was convened pursuant to N.C.G.S. 15A-2000, before the same jury that had determined guilt in the case. During the State's case in chief in the penalty phase, the State presented evidence of a previous conviction of the petitioner involving use or threat of violence to the person, a statutory aggravating circumstance under N.C.G.S. 15-2000(3). The State also presented evidence concerning numerous

unrelated criminal offenses alleged to have been committed by the petitioner, most of which petitioner had never been charged with nor convicted of. (R. 340-341, 374-375, 315-319, 382-384).

After the State rested during the penalty phase, petitioner presented evidence of mitigating circumstances to the jury. One of petitioner's witnesses, Dr. Rolf Fisscher, a psychiatrist who had examined petitioner, testified that, in his opinion, at the time the offense was committed by Norris Taylor that he was under the influence of a mental or emotional disturbance, a statutory mitigating circumstance denominated in N.C.G.S. 15A-2000(f)(2). (R.412-413). Dr. Fisscher also testified that in his opinion the petitioner's capacity to conform his conduct to the requirements of law at the time of the offense was impaired, a statutory mitigating circumstance denominated in N.C.G.S. 15A-2000(f)(6). (R. 413). As soon as Dr. Fisscher was turned over to the District Attorney for cross examination, the District Attorney directed Dr. Fisscher to read the two competency evaluation reports which had been prepered by Dr. Bob Rollins and which had been turned over to the District Attorney pursuant to court order, earlier during the trial. (R. 413). Over constant and timely objections by defense counsel, a lengthy cross examination of Dr. Fisscher ensued, which cross examination consisted primarily of the District Attorney's reading certain portions of Dr. Rollins' report to the jury and then asking Dr. Fisscher to either agree or disagree with Dr. Rollins' findings and further asking Dr. Fisscher to explain what he thought Dr. Rollins meant by certain terms in Rollins' report. (R. 414-421). This cross examination included the following questions:

> " Q. Dr. Fisscher, are you aware that Dr. Rollins from Dorothea Dix Hospital in a report dated February 12, 1979, with regard to this defendant, found findings totally opposite to yours concluding that Mr. Taylor would not benefit from psychiatric treatment at this time?
>
> " A. I read the report." (R. 414-415).
>
> " Q. Dr. Fisscher, are you aware that in a report of February 12, 1979, Dr. Bob Rollins, in examining this defendant, Norris Taylor, found results contrary to yours, concluding that he did not believe that this

description of auditory and visual hallucinations represented a psychotic illness and that - and concluding that Mr. Taylor, at this time, would not benefit from psychiatric treatment. Are you aware of that?

" Ms. Tally: Objection.

" The Court: Overruled.

" A. I am aware." (R. 416-417).

" Q. I will ask you if you agree or disagree with Dr. Rollins' opinion that Mr. Taylor's problems are characterlogical rather than psychotic?

" Mrs. Tally: Objection, on the same grounds.

" The Court: Overruled.

" A. I disagree with his opinion. My opinion is that they are the basis of psychosis rather than on characterlogical basis.

" Q. Can you explain to the jury when a psychiatrist uses the term chracterlogical, what you gentlemen are talking about when you talk about that aspect?

" Mrs. Tally: Objection, on the grounds that he has not used that, Your Honor.

" The Court: Overruled.

" A. When you talk about the disorders of character, you talk about a different grouping of emotional disturbances. A character is the subtotal of all the behavior and the mood, the thinking that the person displays as a result of his life experiences. Now, the character is formed in this way over the years. When a person is a child his character is still in development and it tends to 'jell' in the mid-teens, while at some point the character stabilizes and is said to change very little beyond that. This is usually in the mid to late teens. Now, a character disorder is a disorder in what, in words, a person shows an aberration in thepersonailty which is - has stiffened, which is set down and which has become a pattern. A person can develop a pattern of frugality, which would be a character trait. A person could display an attitude of optimism in all circumstances which would be a character trait at the time and a person could display other - I could go on; there are any number of anxieties, fears and the like or a tendency to react fearfully, a tendency to react aggressively. The tendency is set and becomes automatic, becomes more and more rigid as a person's life goes on and these habit patterns, as we call them, they become part of the person's way of dealing with life, with reality.

" Q. And you disagree with the conclusion drawn by Dr. Rollins that Mr. Taylor's problems are problems of character rather than of psychosis?

" Mrs. Tally: Objection, on the same grounds.

" The Court: Overruled.

" A. I disagree in that I would - that I did pay much more attention to and put emphasis on the psychotic symptoms and I described those as they were reported to me.

" Q. Dr. Fisscher, are you aware that Dr. Rollins found that Norris Taylor had an emotionally unstable personality manifested by difficulty in interpersonal relationships, antisocial behavior and poor impulse control?

" Mrs. Tally: Objection.

" The Court: Overruled.

" A. I read his report." (R. 420-421).

After presentation of further evidence, the petitioner rested his case.

During the jury instructions conference, defense counsel submitted a written request to the court that the jury be required to indicate on its verdict form which, if any, mitigating circumstances it found in rendering its verdict. (R. 451-453). The court denied this request. (R. 451). In due course, the trial court then instructed the jury with regard to its duties to determine punishment in the case. The verdict form submitted for the jury to complete did not require the jury to specifically indicate which, if any, mitigating circumstances it found. Indeed, the court instructed the jury that "you need not indicate on this form which mitigating circumstances you do or do not find." (R. 477). Defense counsel also specifically objected to the trial court's announced intention to submit to the jury as an aggravating circumstance that the murder was committed while the petitioner was engaged in the commission of the felony of robbery on the grounds that submission of this aggravating circumstance would violate the merger doctrine under North Carolina law and double jeopardy provisions since the robbery was the felony underlying the felony murder conviction. (R. 453-454). The trial court overruled the objection. (R. 454).

After deliberation, the jury returned to the courtroom and submitted a written verdict form recommending that petitioner be sentenced to death. (R. 475-478). The verdict form indicated that the jury found three statutory aggravating circumstances:

" 1. Had Norris Carlton Taylor been previously convicted of a felony involving the use or threat of violence to the person?

ANSWER: Yes.

" 2. Was this murder committed while Norris Carlton Taylor was engaged in the commission of the felony of robbery?

ANSWER: Yes.

" 3. Was this murder committed for pecuniary gain?

ANSWER: Yes." (R. 476).

The jury further answered on the form with regard to mitigating circumstances:

" Do you find one or more mitigating circumstances?

ANSWER: Yes.

BEFORE YOU ANSWER ISSUE THREE, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. YOU NEED NOT INDICATE ON THIS FORM WHICH MITIGATING CIRCUMSTANCES YOU DO OR DO NOT FIND.

IF YOU FIND ONE OR MORE OF THE MITIGATING CIRCUMSTANCES FROM THE EVIDENCE WRITE, "YES" IN THE SPACE AFTER ISSUE THREE, ABOVE. IF YOU DO NOT FIND ANY MITIGATING CIRCUMSTANCES, WRITE, "NO," IN THAT SPACE.

1. This murder was committed while Norris Carlton Taylor was under the influence of mental or emotional disturbance.

2. The capacity of Norris Carlton Taylor to conform his conduct to the requirements of the law was impaired.

3. The age of Norris Carlton Taylor at the time of this murder.

4. The defendant aided in the apprehension of another capital felon.

5. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value." (R. 477).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Just prior to the beginning of the competency hearing called by the court, at the time when the District Attorney requested that the court order the written reports and evaluations made by the state psychiatrist to be turned over to him, petitioner objected, stating as specific grounds for his objection, the physician/patient

privilege, the attorney/client privilege, the Fifth Amendment to the United States Constitution, and the Sixth Amendment to the United States Constitution. (R. 268-269). The trial court overruled the petitioner's objection and ordered the reports turned over to the District Attorney. (R. 269). During the penalty phase of the case, petitioner made continuous and timely objections to cross examination of petitioner's psychiatrist based on Dr. Rollins' report, all of which objections were overruled. (R. 413-419).

On appeal to the Supreme Court of North Carolina, petitioner argued that the trial court's rulings in disclosing the competency report to the District Attorney and in allowing cross examination of the defense expert based on these reports violated petitioner's Fifth and Sixth Amendment rights todue process, equal protection effective assistance of counsel, and right to present a defense. (Brief of Appellant at 105-106 and 139-142). The North Carolina Supreme Court rejected these claims, holding that there was no physician/patient privilege created between a physician and a criminal defendant examined by a physician for the purpose of passing on defendant's ability to proceed to trial. State v. Taylor, supra, 283 S.E.2d at 781. The North Carolina Supreme Court further ruled that the procedure used by the State to cross examine petitioner's witness Dr. Fisscher was improper "for the simple reason that it allowed the State to get Dr. Rollins' testimony before the jury at the same time it cross examined Dr. Fisscher." 283 S.E.2d at 781. The Court went on to rule:

> " We do not find reversible error, however, because on redirect examination the defendant asked his witness questions concerning the same report, that is, the one prepared by Dr. Rollins. Thus the improper admission of the testimony was cured when substantially the same evidence was admitted." 283 S.E.2d at 781.

2. Petitioner filed a written request for jury instructions and the use of a verdict form which would have required the jury to specifically denominate which, if any, mitigating circumstances it found from the evidence. (R. 451-453). The trial court denied that motion. (R. 451). The trial court then instructed the

jury that it need not indicate which mitigating circumstances it found. (R. 477). The verdict form returned by the jury indicated that the jury did find one or more mitigating circumstances of the five that were submitted to it for its consideration. (R. 477).

On appeal to the Supreme Court of North Carolina, petitioner argued that the trial court's failure to require the jury to specifically list mitigating circumstances it found violated the Eighth and Fourteenth Amendments to the United States Constitution. (Brief of Appellant at 153-157). The North Carolina Supreme Court rejected this claim, stating that "the judge's instructions made clear to the jury the proper method for weighing the aggravating and mitigating circumstances in reaching its verdict." State v. Taylor, supra, 283 S.E.2d at 783.

3. During trial, petitioner specifically objected to all of the State's evidence concerning unrelated and uncharged accusations of crime against the petitioner, stating that such evidence was evidence of non-statutory aggravating circumstances, which should not be considered by the jury under principles of guided discretion. (R. 313-396). The trial court overruled all such objections. Petitioner also objected to the trial court's submission of the underlying felony of robbery with a dangerous weapon as an aggravating circumstance in the case, stating that submission of that statutory aggravating circumstance would be unconstitutional. (R. 453-454). The court overruled this objection. (R. 454).

On appeal to the North Carolina Supreme Court, petitioner argued that the trial court's rulings allowing evidence of non-statutory aggravating circumstances in the penalty phase of the case made the death sentence unreliable and violated principles of guided discretion. (Brief of appellant at 115-121, and Memoranda of Additional Authorities at 1-2). The North Carolina Supreme Court agreed that it was error for the trial court to admit much of such testimony but concluded that "such error was harmless beyond a reasonable doubt ...." State v. Taylor, supra, 283 S.E.2d at 729. Petitioner further argued on appeal to the

North Carolina Supreme Court that it was prejudicial error under prior state law to allow consideration of the felony underlying a felony murder conviction to be considered as an aggravating circumstance by the jury during the penalty phase of the case. (Brief of Appellant at 157-163). Petitioner further argued in Memoranda of Additional Authorities that such error constituted prejudicial error and required a reversal of the case for a new sentencing hearing. (Memoranda of Additional Authorities at 3-12).

The North Carolina Supreme Court agreed with the defendant that the trial court erred in submitting this aggravating circumstance. The Court went on to say that the proper test for determining whether the error was harmless is whether there is a "reasonable possibility" that the evidence complained of might have contributed to the imposition of the death penalty. State v. Taylor, supra, 283 S.E.2d at 784. The Court went on to hold that "our review of the voluminous evidence offered by the State convinces us that submission of the aggravating circumstance that the murder was committed while committing the robbery was not prejudicial error." State v. Taylor, supra, 283 S.E.2d at 784.

REASONS FOR GRANTING THE WRIT

I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE USE AT THE SENTENCING PHASE OF A CAPITAL TRIAL OF REPORTS PREPARED BY A STATE PSYCHIATRIST PURSUANT TO COURT-ORDERED COMPETENCY EXAMINATIONS, BASED ON INTERVIEWS WITH A DEFENDANT WITHOUT WARNING THAT HIS STATEMENTS WOULD BE USED AGAINST HIM, VIOLATED THE FIFTH AMENDMENT.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE USE BY THE STATE OF REPORTS, PREPARED BY A NON-TESTIFYING STATE PSYCHIATRIST FROM COURT-ORDERED COMPETENCY EXAMINATIONS, DURING CROSS-EXAMINATION OF A DEFENSE EXPERT IN THE PENALTY PHASE OF A CAPITAL TRIAL VIOLATED THE SIXTH AMENDMENT.

This case presents important consitutional questions about the implications and reach of this Court's decision in Estelle v. Smith, 68 L.Ed 2d 359 (1981), in which the Court ruled that a defendant has both Fifth and Sixth Amendment rights in connection with a psychiatric examination conducted by court order which is used by the prosecution at the sentencing phase of a capital trial.

This Court ruled in Estelle v. Smith, supra, that a defendant has both Fifth and Sixth Amendment rights in connection with a psychiatric exam conducted by court order which is used at the penalty phase of a capital trial. Because the sentencing phase of a death penalty case is essentially a mini trial on the issue of punishment (Bullington v. Missouri, 68 L.Ed 2d 270 (1981)) there is no basis to distinguish between the guilt and penalty phases of a capital murder trial as far as the protections of the Fifth Amendment, Sixth Amendment and Fourteenth Amendment are concerned. See Green v. Georgia, 442 U.S. 95, (1979); Presnell v. Georgia, 439 U.S. 14 (1978); and Gardner v. Florida, 430 U.S. 349 (1977). The importance of assuring that these guarantees during the penalty phase are complied with is particularly strong when, as was the case in Missouri in the Bullington decision, a lay jury determines punishment. Thus, in North Carolina, where a jury determines punishment with a binding recommendation upon the judge, the court should be particularly sensitive to these constitutional protections afforded a capital defendant.

In Smith, the Court noted that the defendant undergoing a court-ordered competency examination had not been warned that anything he said would be used to gather evidence to decide whether, if convicted, he should be sentenced to death. The Court then ruled that since the Fifth Amendment privilege is as broad as the evil against which it was intended to work as a safeguard, a criminal defendant may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. The Court's ruling, however, was limited to the situation in which a defendant neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence.

The present case presents a similar factual situation to Smith, but calls upon the Court to determine the reach of the Smith holding under facts reserved in that decision. In this case, petitioner's counsel sought a psychiatric examination for the purpose of determining whether petitioner was competent to stand trial, and two such examinations were conducted pursuant to court order by the state psychiatrist. During the guilt phase of the trial, the trial judge requested the District Attorney to contact Dr. Rollins, the state psychiatrist, and the state psychiatrist was called as a witness during a competency hearing by the court. (See R. 268). Dr. Rollins then testified out of the presence of the jury concerning his findings of competency, and his full reports were ordered turned over to the District Attorney. (See R. 270). During the presentation of mitigating evidence on behalf of petitioner during the penalty phase of the case, an independent defense psychiatrist was called to testify as to two statutory mitigating circumstances pursuant to N.C.G.S. 15A-2000(f). Even though Dr. Rollins, the state psychiatrist, was never called as a witness by the State before the jury, the trial court allowed extensive cross examination of the defense expert based upon the findings and opinions of the non-testifying state psychiatrist. Such cross examination simply served to allow the District Attorney to testify in Dr. Rollins' place before the jury by allowing the District Attorney

to quote extensively from Dr. Rollins' report and asking the defense psychiatrist to explain what he thought Dr. Rollins meant by certain terms in the report. Thus, though Dr. Rollins never himself testified, his findings and conclusions made during two competency examinations pursuant to court order were used, not only to impeach the defense psychiatrist, but also as substantive evidence favorable to the State's argument for death. Thus, like the defendant in Estelle v. Smith, petitioner's responses to the state psychiatrist were used by the prosectuion at the penalty phase to advance an argument in favor of the death penalty, though petitioner had never been warned that his statements to and his cooperation with the state psychiatrist would or could be used against him in the penalty phase of his case. Under Miranda v. Arizona, 384 U.S. 436 (1966), the evidence provided to the state psychiatrist while in custody pursuant to a court ordered psychiatric evaluation was thus used against the petitioner in favor of the death sentence without having been freely, voluntarily and knowingly made as required by the Fifth Amendment to the United States Constitution.

Although defense counsel in Smith did not request a psychiatric exam of the defendant, whereas in this case the psychiatric examination was conducted pursuant to court order upon motion of the defense counsel, this Court should rule that the decision in Estelle vs Smith controls in this case. The United States Court of Appeals for the Fifth Circuit has recently reached this issue in Battie v. Estelle, 655 F.2d 692 (1981), wherein the Court ruled that the defendant did not waive his Fifth Amendment privileges by requesting a psychiatric examination to determine his competency to stand trial and his sanity at the time of the commission of the crime. That Court ruled that had the psychiatrist's examination been used only to determine Battie's competency to stand trial, no Fifth Amendment issue would have arisen. Clearly, in the present case, the defense introduced evidence of mental illness in mitigation of the offense. However, this Court should rule that a criminal

defendant does not waive all of his Fifth and Sixth Amendement protections by introducing mitigating evidence in his own behalf. The evil in the present case is just as egregious as the evil in Smith and Battie in that unwarned statements made by defendant while in custody to a court-appointed psychiatrist were used by the prosecution to argue for a sentence of death. In this case, petitioner was neither advised that such use of his statements would be made, nor was petitioner able to confront and cross examine the witness against him, since the witness was never called, but his entire report was placed in front of the jury.

This Court has declared that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Griffin v. Illinois, 351 U.S. 12 (1965). This Court has further concluded that a criminal defendant's inability to martial the information necessary to present his version of the facts smacks of fundamental unfairness. Argersinger v. Hamlin, 407 U.S. 25, 31-33 (1972); see also Gideon v. Wainwright, 372 U.S. 355 (1964). Since petitioner in the present case is an indigent, he was not able to retain a psychiatrist to conduct a confidential psychiatric examination, as a wealthy individual no doubt would have. Petitioner's only recourse was to petition for a court ordered psychiatric examination by the state psychiatrist; yet, petitioner's cooperation with the state psychiatrist was used by the prosecution to undermine substantial mitigating evidence presented by the defense and was used by the prosecution to support a death verdict. Petitioner contends that he was denied due process of law when the death sentence imposed upon him could have been based, at least in part, on the evidence as to the findings of the state psychiatrist during a competency examination which petitioner was not warned could be used against him. The error was compounded in this case by the fact that petitioner was never able to confront and cross examine the psychiatrist and was therefore unable to challenge the accuracy or materiality of the information contained

in his report in violation of his Sixth Amendment right to confront and cross examine witnesses against him. Thus, petitioner argues that the inability to confront a material witness against him and the difficulty in combating the ghostlike quality of the hearsay nature of the state psychiatrist's report impaired the interest in reliability as required by the Due Process clause as much as secrecy did in Gardner v. Florida, supra, and as much as surprise did in Estelle v. Smith, supra.

Therefore, this Court should grant certiorari to determine whether the disclosure of court-ordered competency examinations to the District Attorney and the use of those reports during the sentencing phase of a capital trial, where the state psychiatrist was not called as a witness to testify, violates petitioner's constitutional rights under the Fifth Amendment, Sixth Amendment, and Fourteenth Amendment.

II

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE REFUSAL TO REQUIRE A JURY TO SPECIFY WHICH MITIGATING CIRCUMSTANCES IT FOUND VIOLATED THE EIGHTH AMENDMENT AND THE FOURTEENTH AMENDMENT.

To comply with Furman v. Georgia, 408 U.S. 238, 33 L.Ed 346, 92 S.Ct 2726 (1972) the sentencing procedures in a capital case "should not create 'a substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner.'" Lockett v. Ohio, 438 U.S. 586, 602, 57 L.Ed 2d 973, 98 S.Ct 2954 (1978), citing Gregg v. Georgia, 428 U.S. 153, 189, 49 L.Ed 2d 859, 96 S.Ct 2909 (1976). In Lockett v. Ohio, supra, the Court noted that "Furman did not require that all sentencing discretion be eliminated, but only that it be 'directed and limited,' [cite omitted] so that the death penalty would be imposed in a more consistent, rational manner and so that there would be a 'meaningful basis for distinguishing the ... cases which it is imposed from ... the many cases in which it is not.' [Cite omitted]." Lockett v. Ohio, supra, at 601.

The Eighth Amendment and Fourteenth Amendment to the United States Constitution require that the sentencer be given full opportunity to consider mitigating circumstances in a capital case. Lockett v. Ohio, supra.

This Court has recognized that the concept of individualized sentencing in criminal cases has long been accepted in this country. Lockett v. Ohio, supra. "The opinions of this court going back many years in dealing with sentencing in capital cases have noted the strength of the basis for individualized sentencing. For example, Mr. Justice Black, writing for the court in Williams v. New York, [cite omitted] - capital case - observed that the 'whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of conviction even for offenses today deemed trivial.'" Lockett v. Ohio, supra, at 603, citing Williams v. New York, 337 U.S. 241, 93 L.Ed 1337, 69 S.Ct 1079 (1949).

A sentencer, be it a jury or judge, properly discharging the duty of imposing a prompt and just sentence "is authorized, if not required, to consider all the mitigating and aggravating circumstances involved in the crime." Lockett v. Ohio, supra, at 603, citing Williams v. Oklahoma, 358 U.S. 583, 3 L.Ed 2d 516, 79 S.Ct 421 (1959).

"[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and the circumstances of the offense proferred in mitigation creates the risk the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett v. Ohio, supra, at 605.

In the present case petitioner's counsel at the instruction conference in the penalty phase requested the trial court to submit to the jury an instruction that they specify on the verdict sheet

the mitigating circumstances they found to exist. (R. 451). The trial court refused. (R. 451). In addition, the trial court further instructed the jury that while it must specifically answer whether it found any of three aggravating circumstances, the jury was expressly instructed that it was not to set out which and how many, if any, of the five mitigating circumstances proffered it found to exist. (R. 477). This action of the trial court in refusing to require, as requested, the jury to specify which of the mitigating circumstances found to exist did not comport with the constitutional requirement enunciated in Lockett v. Ohio, supra, for individualized sentencing. The procedure in instructing the jury that it specifically need not write down which of the mitigating circumstances proferred it found, abrogated the petitioner's Due Process rights guaranteed by the Fourteenth Amendment to the United States Constitution by denigrating the mitigating circumstances proffered and by making appellate proportionality review impossible. This procedure "encourages the jury to think that the mitigating circumstances are less worthy of consideration than the aggravating circumstances. Under this practice the jury is not required, as it should be, to focus its full attention on each submitted mitigating circumstance individually in order to determine whether it exists." State of North Carolina v. Rook, _____N.C. _____, 283 S.E. 2d 756 (November 3, 1981), dissenting opinion J. Exum. The dissenting opinion by Justice Exum of the North Carolina Supreme Court in State v. Rook was incorporated in and is basis for his dissent in State of North Carolina v. Norris Carlton Taylor decided the same day by the State Supreme Court.

"Under our statutory scheme permitting the jury to return a recommendation for death without requiring it to specify which mitigating circumstances it finds to exist so dilutes the jury's constitutional duty to consider, in the words of Lockett, 'any aspect of the defendant's character or record and any of the circumstances of offense that defendant proffers as the basis for sentence less than death' and to give them 'independent mitigating

weight' that it skirts dangerously close to violating these constitutional requirements." State of North Carolina v. Rook, supra.

Further, not requiring the jury to specify which mitigating circumstances it found is violative of the Eighth Amendment and Fourteenth Amendment to the United States Constitution as it denies petitioner the ability to obtain appellate proportionality of review to insure that the death verdict not be arbitrarily, wantonly or freakishly applied. Without these guidelines and requirements, the trial court has afforded no meaningful basis for distinguishing this case from the many others in which death was not imposed.

As will be shown in Question III, presented for review infra, the failure to require the jury to specify which of the mitigating circumstances presented it did find is especially harmful in a case such as this where the jury heard aggravating evidence which it should not have been allowed to hear. In other words, the present case presents a situation in which the sentencing jury heard aggravating evidence which was improperly submitted for its consideration, and it is impossible to determine what weight the jury accorded that evidence in reaching its decision; on the other hand, the jury did find some mitigating circumstances, but it is now impossible to determine which it found and how important they were.

This Court has never spoken to the issue of requiring a jury to specify mitigating circumstances found, especially in a case in which the jury heard improper aggravating evidence and in which the jury was erroneously instructed to consider a specific statutory aggravating circumstance.

Accordingly, the Court should grant certiorari to determine whether the trial procedure of not requiring the jury to list the mitigating factors it found to exist and further of instructing the jury it need not indicate how many mitigating circumstances it found resulted in a sentence of death for the petitioner in violation of the Eighth Amendment and the Fourteenth Amendment of the United States Constitution.

III

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S DEATH SENTENCE HAS BEEN UPHELD IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE IT WAS BASED UPON ERRONEOUSLY SUBMITTED AGGRAVATING EVIDENCE.

It is a fundamental principle established by repeated decisions of this Court that whenever a jury has been instructed to consider several grounds for conviction, one of which proves unconstitutional, if a reviewing court is thereafter unable to determine from the record whether the jury relied upon the unconstitutional ground, the verdict must be set aside. See Stromberg v. California, 283 U.S. 359, 367-368 (1931) and Williams v. North Carolina, 317 U.S. 287, 291-292 (1942). Further, both the Eighth Amendment and Due Process clause of the Fourteenth Amendment require that the decision to impose a sentence of death must be a reasoned and rational determination and not the product of passion or emotion. In Gregg v. Georgia, 428 U.S. 153 (1976), the Court upheld Georgia's death penalty statute against an Eighth Amendment challenge in part because of the express statutory mandate that the State Supreme Court review every death sentence to determine whether it "was imposed under the influence of passion, prejudice, or any other arbitrary factor." See Gregg v. Georgia, supra, 428 U.S. at 198. See also Godfrey v. Georgia, 446 U.S. 420 (1980).

In this case, although the North Carolina Supreme Court found that, out of the three aggravating circumstances submitted to and found by the jury, one (the felony underlying petitioner's murder conviction), had clearly erroneously been submitted, the Court found this error to be harmless and upheld petitioner's death sentence. Thus, in finding no reversible error in the erroneous submission of an aggravating circumstance, the North Carolina Supreme Court has engaged in speculation as to how this aggravating circumstance could have affected the jury in violation of this Court's insistance that there must be a rational, consistent, and reliable process for determining whether a death sentence should be imposed in a particular case. See Gregg v. Georgia, supra; see also Woodson v. North

Carolina, 428 U.S. 280 (1976). Further, in Gardner v. Florida, 430 U.S. 349, 358 (1977), the Court stressed that:

> "It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

Not only did the North Carolina Supreme Court recognize that one aggravating circumstance had erroneously been submitted to the jury, the Court's opinion also agreed that lengthy evidence of non-statutory aggravating circumstances offered by the prosecution during its case in chief in the penalty phase of the case was erroneous. It is impossible to speculate what effect such inflammatory evidence might have had upon the jury in reaching its ultimate decision in this case to vote to impose the death penalty. "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett v. Ohio, 438 U.S. 586 at 605 (1978).

As the United States Court of Appeals for the Fifth Circuit recognized in its opinion in Stephens v. Zant, 631 F.2d 397, 406 (1980):

> " It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance. The jury had the authority to return a life sentence even if it found statutory aggravating circumstances. It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty but for the decision that the offense was committed by one having a substantial history of serious assaultive criminal convictions, an invalid ground. The presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of the petitioner which otherwise would not have been before it. ... It cannot be determined with the degree of certainty required in capital cases that the evidence of these convictions, together with the instruction, did not make a critical difference in the jury's decision to impose the death penalty."

This Court has granted certiorari in Zant v. Stephens to review the decision of the Fifth Circuit Court of Appeals. Petitioner respectfully requests that the Court grant certiorari in this case to consolidate the case with Zant v. Stephens, or, in the alternative,

hold this petition pending the opinion in Zant v. Stephens.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

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Attorney of Record

IN THE SUPREME COURT OF NORTH CAROLINA FALL TERM 1981

STATE OF NORTH CAROLINA)
)
v) No. 108 - New Hanover
)
NORRIS CARLTON TAYLOR)

Appeal by defendant from judgments entered by Judge Gavin at the 28 May 1979 Special Criminal Session of Superior Court, New Hanover County. This case was docketed and argued as No. 8, Spring Term 1981.

Upon pleas of not guilty, defendant was tried upon two bills of indictment, proper in form, charging first degree murder and armed robbery (79CRS6425) and aggravated kidnapping, armed robbery, and assault with a deadly weapon with intent to kill inflicting serious bodily injury (79CRS6426). Defendant was found guilty as charged. For his conviction of first degree murder under the felony murder rule, defendant was sentenced to death. For his conviction of kidnapping, defendant was sentenced to a term of eighty years minimum, eighty years maximum. For his conviction of armed robbery (second count), defendant was sentenced to a term of eighty years minimum, eighty years maximum to begin at the expiration of and run consecutively to the sentence imposed on the count of kidnapping. For his conviction of assault with a deadly weapon with intent to kill inflicting serious bodily injury, defendant was sentenced to a term of twenty years minimum, twenty years maximum to commence at the expiration of and run consecutively to the sentence he received on the count of armed robbery. From the judgments and commitments entered, the defendant appealed. Defendant's motion to bypass the Court of Appeals on the convictions for armed robbery (second count), kidnapping and assault with a deadly weapon with intent to kill inflicting serious bodily injury was allowed 19 November 1980.

RUFUS L. EDMISTEN, Attorney General by Assistant Attorney General Donald W. Stephens and Special Deputy Attorney General Isaac T. Avery III for the State.

MARY ANN TALLY, Public Defender, for the defendant.

MEYER, Justice.

This appeal presents sixty-two assignments of error for our review. No meaningful summary statement of these numerous assignments is possible. Each of the assignments susceptible of merit is treated separately. Our conclusion is that defendant is entitled to a new trial on the kidnapping charge. On all other charges, we find no error.

In relevant summary the facts are: On 30 August 1978, Patty Bazemore was accosted by the defendant in Woodland, North Carolina. At gunpoint, he forced her to drive with him, in her automobile, to Fayetteville, where they spent the night in a park. The next day defendant told Bazemore that they would leave her car and try to obtain another, because defendant was afraid the police would be looking for the Bazemore automobile. Defendant was unsuccessful in his efforts to secure another car, and that night, 31 August 1978, Bazemore and defendant slept on a railroad track. On the morning of 1 September 1978, defendant left Bazemore in a downtown park, warning her not to move, and went to obtain a car.

Clarence Edward Davis testified for the State that he was in the parking lot of the Cardinal Building in Fayetteville on the morning of 1 September 1978. As he watched, he saw a man whom he identified as defendant come out from behind the building, cross a wall and approach a young woman, later identified as Mrs. Murchison, who had just parked her car. Davis testified that the two argued, the defendant apparently wanting her pocketbook and car keys. As Mrs. Murchison turned away, Davis said he heard two gunshots and saw Mrs. Murchison stagger. Defendant fled in Murchison's car, a tan 1976 Buick Electra 225 with two doors, passing within fifteen to twenty feet of Davis.

Defendant then returned to where he had left Bazemore and ordered her into the car. Within five minutes defendant and Bazemore abandoned the car, went to the bus station nearby and

took a taxi to the Eutaw Shopping Center. Across the street from the shopping center was a Winn Dixie grocery store, and in the parking lot of that store defendant approached Malcolm Biles. Defendant told Biles that he had had car trouble, and Biles offered to help. Once in Biles' car, a 1974 Cadillac Coupe de Ville, defendant brandished a handgun and ordered Biles to drive. After driving for a time, defendant ordered Biles to stop the car. Defendant then locked Biles in the trunk of the car and began driving. Biles became uncomfortable in the trunk and began to make noise by beating on the trunk with the tire iron. Defendant stopped the car, ordered Biles into the back seat, and drove on. A short time later defendant turned off onto a dirt road, forced Biles into the woods and shot him.

Defendant then drove into the town of Woodland, North Carolina, and released Patty Bazemore. As defendant drove out of town, he was observed by Roosevelt Britt, a part-time Woodland police officer. Defendant was captured after a high-speed chase and taken to the Sheriff's Department in Jackson, North Carolina.

Other facts necessary for an understanding of the questions posed on appeal are included in the body of the opinion.

We now consider defendant's assignments of error:

GUILT/INNOCENCE PHASE

I.

Defendant brings forward as his assignment of error number 1 the denial by the trial court of his motion for a bill of particulars stating the aggravating circumstances upon which the State would rely in seeking the death penalty.[1] Defendant made that motion in pretrial proceedings, and renewed it immediately after the jury returned a verdict of guilty of first degree

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[1]Defendant's assignment of error number 1 is very similar to assignment number 33, which charges error in the trial court's denial of defendant's oral motion to disclose aggravating circumstances and information relevant to sentencing, made by defendant immediately prior to the penalty phase. Accordingly, these two assignments are treated together.

murder. Judge Canady denied the earlier motion, and upon the later motion Judge Gavin found that the State had fully complied with the statutory discovery procedures and therefore also denied the motion.

By his brief, defendant argues that in a trial for first degree murder where the State seeks the death penalty, the defendant is entitled as a matter of constitutional right, guaranteed by the sixth, eighth and fourteenth amendments to the United States Constitution, to notice, prior to trial, of any and all aggravating circumstances upon which the State intends to rely in seeking the death penalty. Failure to require the State to give such particularized notice, says defendant, violates due process requirements that a defendant be fully apprised of the charge against him, and also interferes with defendant's right to effective assistance of counsel.

Defendant's first contention arises from his characterization of this State's capital punishment law as "an enhanced punishment law." The defendant contends that the presumed punishment for first degree murder in North Carolina is life imprisonment. Therefore, if the State intends to rely on a statute providing for enhanced punishment, i.e. death, such a statute should, as a matter of constitutional law, require separate pleadings with respect to the enhancing circumstance. The practical effect of agreeing with defendant's argument would be paramount to saying that by proceeding on a theory of aggravation the State has in effect brought a separate charge against defendant, requiring separate pleadings. We decline to reach such a result.

To begin with, we do not find defendant's characterization of life imprisonment as the "presumed" punishment to be accurate. It is true that life imprisonment is, under G.S. 15A-2000, the minimum punishment, but no sentence can be imposed until after a separate sentencing phase. The factors enumerated in G.S.

15A-2000 are not elements of the offense but rather are guidelines defining the parameters of the jury's discretion in determining punishment. The only aggravating circumstances upon which the State may rely are enumerated in G.S. 15A-2000(e). Consistent with the holding in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed 2d 796 (1979), we hold that this statutory notice is sufficient to meet the constitutional requirement of due process. See Clark v. State, 379 So.2d 97 (Fla. 1979), cert. denied, _____ U.S. _____, 101 S.Ct. 1402, 67 L.Ed 2d 371 (1981); Bowden v. Zant, 244 Ga. 260, 260 S.E.2d 465 (1979); cert. denied, 444 U.S. 1103, 100 S.Ct. 1068, 62 L.Ed 2d 1068 (1980); Houston v. The State, 593 S.W.2d 267 (Tenn. 1980); State v. Berry, 592 S.W.2d 553 (Tenn. 1980).

Defendant is not entitled to notice of the evidence which the State intends to offer in support of and to prove aggravating circumstances. Although some other states which also leave the question of punishment to the jury do require the prosecution to provide evidence to defendant of the aggravating circumstances the State will pursue, such a requirement is purely statutory. See e.g. Delaware Code Ann. 11 § 4209(c)(1)(1979); Georgia Code Ann. § 27-2503 (1978); Maryland Code Ann. Art. 27, § 412(b) (Cum. Supp. 1978). Our legislature has not enacted such a requirement. G.S. 15A-925 provides that a defendant may move for a bill of particulars requesting items of factual information which "pertain to the charge" and without which "the defendant cannot adequately prepare or conduct his defense . . . ." The indictments were sufficient to provide defendant with a factual basis necessary to understand the State's cases against him. Defendant was adequately apprised of the charge by the State and was provided with evidence necessary to the preparation of his defense. A motion for a bill of particulars is addressed to the sound discretion of the trial court and not subject to review except for palpable and gross abuse of discretion. State v. Silhan, 302 N.C. 223 , 275 S.E.2d

450 (1981); State v. Swift, 290 N.C. 383, 226 S.E.2d 518 (1976). We find no abuse of that discretion here. Accordingly, this assignment of error is overruled.

II.

Defendant next contends in assignment of error number 2 that the trial court erred in allowing an assistant district attorney to testify as to a material fact during a hearing on a motion to suppress statements of the defendant. Defense counsel argues that this testimony violated professional ethical standards because the assistant district attorney is in effect a member of the "law firm" prosecuting this defendant. This argument was considered and dismissed as meritless by this Court in a previous opinion involving this same defendant. See State v. Taylor, 301 N.C. 164, 270 S.E.2d 409 (1980). Once again we deem this argument completely without merit.

III.

Defendant's assignment of error number 3 charges error in the denial by the trial court of defendant's motion to suppress certain statements made by defendant. The record before us shows that at the time defendant was arrested, he was ordered at gunpoint to lay on the ground as he was handcuffed and read his Miranda rights. A hostile crowd began to gather. After defendant was read his rights and defendant acknowledged that he understood them, Chief Sandlin, the arresting officer, asked where Miss Bazemore and Malcolm Biles were. Defendant answered that he had released Miss Bazemore unharmed and had shot Mr. Biles on Highway No. 97. Defendant now complains that his statements to Chief Sandlin were not voluntarily made since he was being held at gunpoint and was surrounded by a hostile crowd. This contention, and defendant's companion objections to the admissibility of statements later made by defendant to police investigators were treated in our opinion in State v. Taylor, 301 N.C. 164, 270 S.E.2d 409

(1980). We deem it unnecessary to retread ground so ably covered by Justice Carlton in that opinion. Accordingly, this assignment is overruled.

IV.

By assignments of error numbers 4 and 5, defendant complains first of the trial court's denial of his motion for separate juries in the guilt/innocence and penalty phases of the trial; and second, of the court's denial of his motion challenging "death qualification" voir dire questions of the jury by the district attorney.

In essence, defendant contends that allowing the State to exclude jurors from the guilt/innocence phase of trial because of their opposition to the death penalty which might be imposed in the sentencing phase is unconstitutional. Such a procedure, says defendant, eliminates a substantial group of jurors who would be able to determine guilt or innocence at the first phase of trial. Defendant argues that empirical evidence shows that this exclusion produces a jury more punitive in legal matters and less tolerant of minorities.

To begin with, this Court has previously held that so-called "death qualification" of jurors is proper. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979). In State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980), this Court found unpersuasive the argument that "death qualification" of jurors during the guilt phase of trial produces a "prosecution prone jury skewed against Negroes and the lower economic classes." Id. at 137, 261 S.E.2d at 810. There Justice Brock cited Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed 2d 776, rehearing denied, 393 U.S. 898 (1968), wherein the U.S. Supreme Court said that it could not "conclude either on the basis of the record . . . or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the

issue of guilt or substantially increases the risk of conviction." 391 U.S. at 517, 518, 88 S.Ct. at 1774, 1775, 20 L.Ed 2d at 782. So it is here. See State v. Silhan, 302 N.C. 223 , 275 S.E.2d 450 (1981).

The record before us contains the testimony of a witness, Dr. James Luginbuhl, that exclusion of those opposed to the death penalty results in the systematic exclusion of black jurors. Dr. Luginbuhl's testimony consisted of his own observations and the results of a survey he conducted of 186 persons in New Hanover County prior to this trial. That survey, according to the record, was completed in two days. There is no evidence as to how those surveyed were chosen, or what the make-up of the survey pool was in terms of age, race, education or economic position. As apparently was the case with the trial court, we attach little weight to Dr. Luginbuhl's personal conclusion that blacks are systematically excluded by "death qualification" jury selection.

Under Article 100 of Chapter 15A of the General Statutes of North Carolina, it is intended that the same jury should hear both phases of the trial unless the original jury is "unable to reconvene." G.S. 15A-2000(a)(2); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979). This assignment is overruled.

V.

Defendant next assigns as error (assignment of error number 6) the trial court's failure to allow defendant's witness, Dr. Luginbuhl, to testify during the evidentiary hearing on defendant's motion to challenge the composition of the petit jury as to his opinion of the prejudices white jurors not opposed to capital punishment would be likely to harbor against a black criminal defendant. We affirm the action of the trial court.

We note at the outset that the witness was never offered as an expert, nor was he qualified as such. By his own testimony, we surmise that he was prepared to offer an opinion on the complex

question raised by this assignment based on his personal experience in observing an unspecified number of capital trials and on the survey discussed in Number IV above. Dr. Luginbuhl's testimony was quite clearly his own opinion, and thus admissible only if he was qualified as an expert witness by the trial court. The competency of a witness to testify as an expert is a question addressed to the discretion of the trial court and is thus not disturbed on appeal unless there is an abuse of that discretion. Utilities Commission v. Telephone Co., 281 N.C. 318, 189 S.E.2d 705 (1972). We find no error in the exclusion of that testimony because of the failure of the party proffering the witness to qualify him as an expert. See State v. Peterson, 225 N.C. 540, 35 S.E.2d 645 (1945), overruled on other grounds in State v. Hill, 236 N.C. 704, 73 S.E.2d 894 (1953).

VI.

Defendant argues in his assignment of error number 7 that reversible error occurred when the trial court failed to compel the chairman of the New Hanover County Jury Commission to answer for the record how he would explain alleged underrepresentation of blacks in jury pools in that county. We disagree.

Defendant had earlier offered evidence that, according to the 1970 census, blacks comprised 22.5% of the total population of New Hanover County. Further evidence was offered by defendant to the effect that currently 23.5% of the total population available for jury service in the County was black, but that, despite this, a sample of the jury pool conducted by defendant's witness James M. O'Reilly showed that only 17.3% of the available persons in the jury pool were black.

Mr. C. P. Farrell, Chairman of the New Hanover County Jury Commission, presented evidence for the State that the jury pool was determined by choosing every second name from the voter registration list and every third name from the county tax list.

The Chairman further stated that those lists did not indicate the race of the individuals, nor does the Commission make any effort to determine race.

During cross-examination of this witness, the following exchange occurred:

> Q. How can you explain the fact that although the population of New Hanover County is made up of 23 percent black people, the jury lists that you have come up with is constituted of only 17 percent black people?
>
> MR. GRANNIS: Objection.
>
> COURT: Sustained.
>
> Exception.
>
> MRS. TALLY: I would like to make an offer of proof.
>
> COURT: The objection is sustained.

Defendant contends the court committed reversible error by sustaining the State's objection and by not allowing defendant to make an offer of proof. We do not agree.

The objection was properly sustained because any answer this witness could have given would have been based on speculation and conjecture. For the same reason, the trial judge acted within his authority in not allowing defendant to include the testimony in the record because it is clear that the testimony would not have been admissible on any grounds. Such matters are properly left, in the first instance, to the discretion of the trial judge. See generally 9 Strong's N.C. Index 3d, Trial § 9. Mr. Farrell had earlier stated that, in his opinion, the jury pool list reflected a fair cross-section of the community. It should be clear then that any statement he might make as to the alleged underrepresentation of blacks could only be based on conjecture. This assignment is overruled.

VII.

Defendant next assigns as error (assignment number 8) the failure of the trial court to quash the petit jury venire

on the basis of alleged unconstitutional systematic exclusion of blacks. Similar contentions have been before this Court in State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980) and State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

In Avery, as here, evidence for the defendant showed that the Mecklenburg County Jury Commission used only voter registration and tax lists in compiling the jury pool. The evidence further showed that blacks constituted roughly 24% of the total population of eligible jurors in Mecklenburg County, while the jury pool reflected black representation of approximately 15%. This Court held that the mere showing of a disparity of 9% in the racial composition of juries did not, in itself, show unconstitutional discrimination, because it did not prove that there was a systematic exclusion of black jurors. "[T]he fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the [Equal Protection] Clause." 299 N.C. at 130, 261 S.E.2d at 806, quoting Washington v. Davis, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed 2d 597, 607 (1976).

In order for defendant to establish the necessary prima facie violation of the sixth amendment's fair cross-section requirement, this Court in Avery, relying on Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed 579 (1979), said that the defendant must show: (1) that the group alleged to be excluded is a distinctive group; (2) that the representation of the group within the venire is not fair and reasonable with respect to the number of such persons in the community; (3) that the underrepresentation is due to systematic exclusion in the jury selection process. 299 N.C. at 134, 261 S.E.2d at 808.

Applying that standard to this case, we first note that the disparity here is only 6.3%, whereas in Avery it was 9%. Thus,

we cannot say that the proportion of blacks is not fair and reasonable. Furthermore, the testimony of Chairman Farrell clearly shows that the jury pool was compiled as required by G.S. 9-2. As a result, we cannot say that the possible underrepresentation which defendant has shown is the product of systematic discrimination. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980). This assignment of error is overruled.

VIII.

Defendant's assignment of error number 9, charging error in the trial court's consolidating defendant's several offenses for trial, is also without merit. The record shows that the offenses joined were not "so separate in time and place and so distinct in circumstances as to render the consolidation unjust and prejudicial to defendant." State v. Johnson, 280 N.C. 700, 704, 187 S.E.2d 98, 101 (1972). We find here a sufficient "transactional connection" between the crimes committed by defendant against Mildred Murchison and against Malcolm Biles, because those crimes were clearly part of a single scheme or plan. State v. Powell, 297 N.C. 419, 255 S.E.2d 154 (1979); see also State v. Parton, _____ N.C. _____, 277 S.E.2d 410 (1981); State v. Bracey, _____ N.C. _____, 277 S.E.2d 390 (1981).

IX.

Defendant next contends by his assignment number 10 that the trial court erred in deferring action on a motion by defendant, made prior to trial and again after the jury returned a verdict of guilty of first degree murder, to compel the State to disclose information relevant to sentencing. This assignment closely follows No. I above; in essence defendant argues that due process required that at the guilt phase he be notified of specific aggravating circumstances upon which the State would rely in seeking the death penalty in the sentencing phase, and further that he be fully advised of all information relevant to the sentencing phase. It is clear that the State is not required to supply

such detailed facts in the guilt/innocence phase of the trial. Thus, defendant urges us to hold in effect that defendant's due process right to discover elements of the State's case at the sentencing phase exceeds such due process right at the guilt/innocence phase of trial, where guilt is determined. This we decline to do.

We have already determined, in No. I above, that defendant had appropriate notice of the aggravating circumstances the State would rely on by virtue of their enumeration in 15A-2000(e). Thus defendant's due process right to know the aggravating circumstances which may be used against him is sufficiently safeguarded. See Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied 440 U.S. 976 (1979). Going beyond that, defendant says that the State should be compelled to disclose the evidence underlying the aggravating circumstances, in order for the defendant to prepare a defense.

The record before us shows that the prosecution had fully satisfied defendant's right to discover evidence as outlined in G.S. Chapter 15A, Article 48. In fact, the district attorney informed the court that he had allowed defendant's attorneys to see his "entire file." This file included a copy of defendant's prior criminal record, statements of witnesses and other relevant information. Most important for our purposes, though, is the fact that the substance of the testimony of witnesses offered at the guilt phase was included in that file. Thus, defense counsel was afforded the opportunity, at a time prior to the sentencing hearing, to ascertain the evidence upon which the State would rely. (Record p. 303).

We further note that prior to the sentencing hearing, the district attorney gave specific notice as to which of the aggravating circumstances the State would rely upon (Record p. 302), and then gave an outline of the evidence the State would

present (Record p. 305). Any constitutional due process right of discovery, not otherwise conferred by statute, which defendant might have had was satisfied by the district attorney's providing this evidence at the time of trial. See State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

X.

Defendant's next assignment of error (number 11) involves two separate questions. First, defendant assigns error to the court's denying defendant the right to question jurors as to whether they felt that the death penalty was "the only appropriate punishment" upon a conviction of first degree murder. As a related question, defendant attempted to ask the jurors whether they could consider a sentence of life imprisonment upon conviction of first degree murder.

Defendant sought to ask some seventeen questions of five different jurors, with the intention of showing that those jurors would automatically vote for the death penalty if defendant was found guilty. Representative of the seventeen questions asked are the following:

> Q. Mr. Warwick, if the State convinced you beyond a reasonable doubt that the defendant was guilty of premeditated murder and you had returned that verdict guilty, do you think then that you would feel that the death penalty was the only appropriate punishment?
>
> Q. Mr. Warwick, if you had sat on the jury and had returned a verdict of guilty of first degree murder, would you then presume that the penalty should be death?
>
> Q. At the first stage of the trial and because of that you voted guilty for first degree murder, then do you think that you could at that time consider a life sentence or would your feelings about the death penalty be so strong that you couldn't consider a life sentence?
>
> Q. If there was a situation with a robbery and a killing, as you have described, do you think that in that situation

> that the death penalty would be the appropriate punishment?
>
> Q. What do you feel is the appropriate punishment for someone who deliberately and with premeditation takes the life of another human being?

To begin with, these questions were overly broad and thus improper because, as hypotheticals, they were incomplete. As the district attorney noted, no mention of mitigating or aggravating factors is made. "On the voir dire examination of prospective jurors, hypothetical questions . . . containing incorrect or inadequate statements of the law are improper and should not be allowed." State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975). Although counsel is allowed wide latitude in examining jurors on voir dire, the form of the questions is within the sound discretion of the court. Id. at 336, 215 S.E.2d at 68. We find no abuse of that discretion here.

XI.

Defendant next charges error in the trial court's excusing for cause fifteen prospective jurors. (Assignment number 12). The jurors were excused after they expressed opposition to the death penalty. A close examination of the record belies defendant's contentions that the responses of the jurors that they could never consider the death penalty were not sufficiently unequivocal. As we stated in State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979):

> A prospective juror is properly excused for cause when his answers on voir dire concerning his attitudes toward the death penalty, although equivocal, show when considered contextually that regardless of the evidence he would not vote to convict the defendant if conviction meant the imposition of the death penalty. (Citations omitted).

Id. at 324, 259 S.E.2d at 526.

There is no merit in this assignment.

XII.

Defendant next charges that the trial court committed

reversible error when, during the voir dire of prospective jurors, it gave incomplete instructions to the jury pool concerning their duty should the trial reach the sentencing phase. (Assignment number 14). Specifically, Judge Gavin, in questioning the jury before they were impaneled, after explaining aggravating and mitigating circumstances, stated that should the jury find the aggravating circumstances outweighed the mitigating circumstances, then the jury should vote to impose the death sentence. Omitted at that time was any instruction that the jurors must also determine that the aggravating circumstances are sufficiently substantial to warrant imposition of the death penalty.

We do not find this omission prejudicial. The instructions were given solely so that prospective jurors could be asked if they could impartially consider aggravating and mitigating circumstances and properly apply the law. Defense counsel did not ask for a more complete instruction. More importantly, the record discloses that the jury was properly instructed during the sentencing phase. In light of the length of the trial and the fact that, at the appropriate time, correct instructions were given the jury, we find this assignment to be without merit.

XIII.

By his next five assignments (numbered 15 through 19), defendant questions the refusal of the trial court to excuse five jurors for cause. Defendant sought to excuse each of the five jurors because of bias or because each juror seemed likely to vote for the death penalty if defendant were found guilty of first degree murder. We have carefully reviewed the record and in each instance find no error warranting reversal. The trial judge is vested with broad discretionary powers in determining the competency of jurors, and that discretion will not ordinarily be disturbed on appeal. State v. Lee, 292 N.C. 617, 234 S.E.2d 574 (1977); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State

v. Johnson, 280 N.C. 281, 185 S.E.2d 698 (1972). These assignments are overruled.

XIV.

By his assignment of error number 20, defendant challenges the admission into evidence, over defense objections, of the in-court identification of the defendant by State's witnesses Davis, Gerald and Rowland.

Clarence Davis was a witness to the shooting of Mrs. Murchison in the parking lot of the Social Security building where she worked. Paul Gerald was Mrs. Murchison's superior at work. The record clearly shows that both men had an adequate opportunity to observe the defendant either as he approached Mrs. Murchison, as he argued with her, or as defendant drove by in Mrs. Murchison's car after shooting her. Defendant argues that the witnesses did not have sufficient opportunity to observe the defendant, and thus, under State v. Miller, 270 N.C. 726, 154 S.E.2d 902 (1967), the testimony should have been excluded.

This argument is clearly specious when set against the factual record in Miller. There this Court found "inherently incredible" identification testimony offered by a witness who did not know the person identified and saw him only briefly, at night, from a distance of 268 feet. In contrast, these witnesses saw the defendant for a much longer time than the witness in Miller, and were much closer to defendant. Witness Davis saw defendant approach Mrs. Murchison, heard them argue, heard two shots, and then watched as defendant drove past him out of the parking lot, at a distance of about 15 to 20 feet. Davis testified that the weather was fair and the light conditions good. Paul Gerald, looking out of the back door of the Cardinal Building, first saw defendant sitting in the Murchison car, at a distance of about 40 feet. As defendant drove away, the car passed within 5 or 6 feet of where Mr. Gerald was standing. Although Mr. Gerald closed

the door of the building as defendant drove by, he testified that he saw the defendant's face for "about 15 or 20 seconds." Any question as to the reliability of this testimony goes to its weight and not its admissibility, since the testimony was clearly admissible. Cf. State v. Davis, 297 N.C. 566, 256 S.E.2d 184 (1979) (witness's identification based on 5-second observation of defendant a few feet away held admissible.) This assignment is overruled.

We likewise find no merit in defendant's contention that witness Roland's identification of defendant was "unreliable." Roland was the taxi driver who picked up defendant and Ms. Bazemore at the Greyhound Bus Station. He testified that the defendant was in his cab for about 15 minutes, and that he observed defendant's face for about 3 minutes. The following day Roland saw a picture of defendant in the Fayetteville newspaper. Based on Roland's voir dire examination, the trial court held Roland's identification testimony admissible. As there were sufficient facts to support Judge Gavin's conclusions of law, they are binding on appeal. Accordingly, this assignment is overruled.

XV.

Defendant argues that testimony by a medical examiner that Mrs. Murchison was pregnant at the time she was shot was inflammatory and prejudicial, and thus should have been excluded. (Assignment number 21). The record shows that similar testimony was earlier elicited from Mr. Murchison without a defense objection. In this jurisdiction, when evidence is admitted without objection and later admitted over objection, the benefit of the objection is lost. State v. Logner, 297 N.C. 539, 256 S.E.2d 166 (1979); State v. Grace, 287 N.C. 243, 213 S.E.2d 717 (1975); Strong's N.C. Index 3d, Criminal Law § 169.3. So it is here.

XVI.

On direct examination, Patty Bazemore testified that defendant told her he had previously abducted a white girl and shot at her when she tried to run. Defendant assigns error to the admission of this testimony, saying it was irrelevant and prejudicial. (Assignment number 23). Defendant also assigns as error the admission into evidence of statements made by defendant to police wherein defendant described his kidnapping of Ms. Bazemore. (Assignment number 24). These statements were made to police officers during the course of interviews of defendant by police officers at the Northampton County Jail on the evening of defendant's arrest.

Simply put, defendant's argument is that the prosecution introduced this evidence solely to show the character of the defendant and to show his propensity to crime. If indeed the evidence was offered solely for that purpose, it would violate the rule in this jurisdiction that the State cannot introduce evidence tending to show that the accused has committed another distinct, independent or separate offense. E.g., State v. Duncan, 290 N.C. 741, 228 S.E.2d 237 (1976); State v. McClain, 240 N.C. 171, 81 S.E.2d 364 (1954).

The State argues that the statements made by defendant concerned a series of acts interwoven one with another so closely that, together, they constitute an overall plan by this defendant to steal cars and to kidnap and rape women. It is the State's contention that under State v. Taylor, 301 N.C. 164, 270 S.E.2d 409 (1980), the statements are therefore admissible. In State v. Taylor, the prosecutrix testified about threatening statements made by the defendant to her about crimes he had previously committed. We held the statements were admissible as part of defendant's overall scheme to kidnap and subdue the will of Jewel Taylor.

State v. Taylor does not control here because defendant was not on trial for any crimes he may have committed against Ms. Bazemore. Our determination in an earlier Taylor opinion that defendant's statements were admissible as "part of a common scheme or plan" was only made in reference to defendant's plan to kidnap and rape Jewel Taylor. The State cannot, under that language, introduce evidence of a series of crimes allegedly committed by defendant but for which he is not on trial unless such evidence is admissible under one of the exceptions to the general rule that such evidence is not admissible. State v. McClain, 240 N.C. 171, 81 S.E.2d 364 (1954). This evidence does not fit within any of the exceptions. For that reason, we agree with defendant that Patty Bazemore's testimony about statements made to her by defendant about other crimes he had committed and statements made by defendant to police concerning his kidnapping of Ms. Bazemore were improperly admitted.

We do not, however, consider the erroneous admission of this evidence to be prejudicial error. G.S. 15A-1443 provides:

> Existence and showing of prejudice. -- (a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

Given the overwhelming evidence against defendant, it is clear that the error was harmless beyond a reasonable doubt and that defendant has not shown, indeed could not show, "a reasonable possibility that . . . a different result would have been reached at the trial out of which the appeal arises." Accordingly, defendant is not entitled to relief from this error.

XVII.

By his next assignment (number 25), defendant concedes

that certain statements of the defendant made to State's witness Officer Jimmy Cook would be admissible as substantive evidence, yet defendant charges error in their admission solely as corroborative evidence. Defendant contends that admitting as corroborative evidence only evidence which could have been admitted as substantive evidence unfairly bolsters the State's case because corroborative evidence is not received with the same safeguards as substantive evidence. We see no merit in this argument; in fact, it is more logical that the limiting instruction was favorable to defendant.

XVIII.

Defendant's next assignment of error (number 26) is that the trial court committed prejudicial error in ordering that a written report evaluating the defendant compiled by a State-appointed psychiatrist be released to the District Attorney. The report was given to the prosecution prior to a competency hearing at which the psychiatrist, Dr. Rollins, testified, and after which the court found defendant competent.

Defendant's argument is in two parts. First, defendant argues that G.S. 15A-1002(d), as it appeared at the time of trial, did not authorize the court to order the full report released. G.S. 15A-1002(d) at that time provided in part that "[t]he full report to the court shall be kept under such conditions as are directed by the court, and its contents shall not be revealed except as directed by the court." We find in that language an implicit power vested in the trial court to order the report released.

The second element of defendant's argument is that disclosure of the report violated the confidential relationship of physician-patient. This Court has previously held, in State v. Mayhand, 298 N.C. 418, 259 S.E.2d 231 (1979), that no physician-patient privilege is created between a physician and a criminal

defendant examined by the physician for the purpose of passing on defendant's ability to proceed to trial. Furthermore, as Chief Justice Branch explained in Mayhand, G.S. 8-53 creates only a limited physician-patient privilege, because a trial judge may compel disclosure and deny defendant the benefit of the privilege if this is necessary "for the proper administration of justice." Id. at 429, 259 S.E.2d at 239.

Defendant's further objection is that, in preparing his report pursuant to an order entered by Judge Canady, Dr. Rollins was instructed by the court to determine whether there were any mitigating circumstances for this defendant and whether defendant could possibly plead insanity. As this inquiry exceeded a simple evaluation of competency to stand trial, defendant argues that Mayhand does not control here, and thus that at least part of Dr. Rollins' report was privileged.

A similar issue was before the Georgia Supreme Court in Thadd v. State, 231 Ga. 623, 203 S.E.2d 230 (1974). There the defendant argued that the doctor in question was a witness for the prosecution, not a witness for the court. Trial transcripts showed, however, that defendant was admitted for psychiatric examination under court order. Given that fact, the Supreme Court of Georgia reaffirmed its holding in Massey v. State, 226 Ga. 703, 177 S.E.2d 79 (1970):

> The psychiatrist appointed by the court for a sanity examination of the defendant may not be regarded as a prosecution witness, but is instead a witness for the court. Jackson v. State, 225 Ga. 790, 793, 171 S.E.2d 501. Hence, the requisite relationship did not exist and it was not error to admit in evidence the psychiatrist's testimony as to statements made to him by the defendant during the course of his examination of the defendant.

Id. at 704-05, 177 S.E.2d at 81.

We agree with that rationale and result. Accordingly, this assignment is overruled.

XIX.

Defendant next assigns error to the trial court's instructions to the jury on the charge of kidnapping. (Assignment number 27). The jury instructions to which defendant objected were as follows:

> [THIRD: That the defendant removed Malcolm Biles for the purpose of facilitating his, the defendant, Norris Carlton Taylor's commission of a felony and flight after committing a felony.]
>
> FOURTH: That the removal was a separate, complete act, independent and apart from a felony.
>
> So, I charge that if you find from the evidence beyond a reasonable doubt that on or about September 1st, 1978, Norris Carlton Taylor, unlawfully removed and carried Malcolm Biles from the vicinity of Fayetteville, North Carolina, to the vicinity of Tarboro, North Carolina, and that Malcolm Biles did not consent to that removal and that [removal was done for the purpose of facilitating the commission of a felony or flight after committing the felony, and that it was a separate, that is that kidnapping was a separate, complete act, independent of and apart from a felony, it would be your duty to return a verdict of guilty of kidnapping.]

Defendant complains that the charge was erroneous because it did not specify the felony which Taylor was supposed to have committed. Proof of commission of a felony is an essential element under G.S. 14-39. The question is whether the failure of the trial court to specifically name the felony in its charge to the jury constituted prejudicial error warranting vacation of the sentence defendant received for kidnapping.

This question of the proper form of a judge's charge on kidnapping was before this Court in State v. Taylor, 301 N.C. 164, 270 S.E.2d 409 (1980). There we accepted a similar argument by the defendant and awarded a new trial on the kidnapping conviction. In that case, the indictment charged defendant with "unlawfully removing" the prosecutrix, "for the purpose of facilitating the commission of the felony of rape and for the purpose of facilitating the flight of the defendant, Norris Carlton Taylor following the commission of a felony." In charging the jury, the trial

judge's language differed significantly from the language of the indictment. The jury was charged that the State had to prove that defendant "unlawfully confined" the prosecutrix or "removed her by force" or "confined or restrained" her "for the purpose of facilitating his flight from apprehension for another crime, or to obtain the use of her vehicle."

In finding that instruction erroneous, Justice Carlton began his analysis by citing State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977), for the proposition that "it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." Applying that standard, Justice Carlton found several prejudicial errors in the jury instructions. First, he noted the variance between the language of the bill of indictment, charging defendant with unlawfully "removing" Jewel Taylor, and the trial court's instruction in terms of the defendant having unlawfully "confined" and "restrained" the prosecuting witness.

Second, while the indictment charged defendant removed Ms. Taylor "for the purpose of facilitating the commission of the felony of rape and for the purpose of facilitating the flight of the defendant . . . following the commission of a felony" the court instructed the jury that defendant would be guilty of kidnapping if, inter alia, the jury found that "the defendant confined or restrained Jewel Taylor for the purpose of facilitating his flight from apprehension for another crime, or to obtain the use of her vehicle." The error here was in the trial court's instructing with respect to "another crime" and in referring to "obtain[ing] the use of her vehicle." The former was erroneous because "another crime" is much broader than the statutory requirement that that crime be a felony. The instruction concerning obtaining the use of the vehicle was erroneous because that charge was not mentioned in the bill of indictment.

Third and finally, the trial court in the earlier Taylor case erred in stating "that the removal was a separate and complete act, independent and apart from his obtaining the vehicle or any other criminal act on his part . . . ." As discussed above, reference to "obtain[ing] the vehicle" was misleading; that charge had been dismissed and was not part of the case before the jury.

The error committed by Judge Gavin in this case was his failure to specify the felony which was facilitated or accomplished by the removal or the felony from which defendant Taylor was fleeing. Our inquiry, then, must be whether his failure to so specify resulted in prejudicial error.

It is clearly the rule in this jurisdiction that the trial court should not give instructions which present to the jury possible theories of conviction which are either not supported by the evidence or not charged in the bill of indictment. In State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977), this Court deemed the trial court's instructions erroneous and prejudicial for several reasons and awarded the defendant a new trial. Likewise in State v. Taylor, 301 N.C. 164, 270 S.E.2d 409 (1980), the instructions presented theories of the crime "which were neither supported by the evidence nor charged in the indictment." The instructions also permitted the jury to consider whether defendant removed the victim for the purpose of sexually assaulting her, a possible theory supported by the evidence but not charged in the indictment. We read Dammons and Taylor as holding that where the indictment for a crime alleges a theory of the crime, the State is held to proof of that theory and the jury is only allowed to convict on that theory. Prejudicial error occurs when, as in Taylor and Dammons, the judge's instructions allow the jury to convict upon some abstract theory supported by the evidence but not alleged in the bill of indictment.

Applying that standard to the facts of this case, we

are compelled to conclude that the failure of the trial court to instruct on the theories expressed in the bill of indictment was prejudicial error. The indictment charged that defendant kidnapped Biles for the purpose (1) of committing armed robbery and assault on him, and (2) to facilitate his flight after committing the felonies of armed robbery and murder in his crimes against Mrs. Murchison. In charging the jury the trial judge did not specify either purpose expressed in the indictment. We find error in the vagueness of the judge's charge because the jury could have convicted the defendant of kidnapping Biles to facilitate his flight after the armed robbery of Biles, a charge not named in the indictment. Because of this possible variance between the indictment and the charge, defendant is entitled to a new trial on the crime of kidnapping.

XX.

There was no error in the trial court's instructions to the jury concerning the question of intent in the charge of first degree murder. (Assignment number 28). The judge instructed:

> Now, members of the jury, under that statute, premeditation and deliberation are presumed. The fact that you shoot and kill a person while committing the crime of armed robbery is deemed to be murder in the first degree. It does not matter what the intent of the defendant might be under such circumstances. (R p 288).

Nowhere, as defendant claims, did the court say that defendant's intent was "irrelevant." In felony murder cases, the law in this State is that premeditation and deliberation are presumed. State v. Wright, 282 N.C. 364, 192 S.E.2d 818 (1972). The killing of a human being by a person engaged in the perpetration of an inherently dangerous felony is murder, "whether intentional or otherwise." State v. Shrader, 290 N.C. 253, 225 S.E.2d 522 (1976).

PENALTY PHASE

XXI.

Defendant next assigns error in the admission of certain testimony offered by the State during its case in chief at the opening of the penalty phase of defendant's trial. (Assignment number 35). Defendant's objections are too numerous to detail here; we will instead address only those we feel necessary to elucidate our holding on this assignment.

Specifically, defendant objects to the State's being allowed to introduce evidence rebutting one mitigating circumstance possibly favorable to the defendant when the defendant never intended to rely on that mitigating circumstance. (Assignment 35). The record shows that the State offered the testimony of several witnesses for the sole purpose of refuting the mitigating circumstance that defendant had "no significant history of prior criminal activity." G.S. 15A-2000(f).

Illustrative of the testimony offered by the State, not for proving any of the aggravating circumstances but rather to disprove a mitigating one, was the testimony of Tina Baker. Ms. Baker testified that on 31 October 1976 she was kidnapped by defendant and another man and that she was raped by defendant at least three times, and beaten and stabbed ten times. The attorney general concedes that this testimony served only to refute G.S. 15A-2000(f).

We agree with defendant that it was error for the trial court to admit such testimony. The proper order for the introduction of evidence of aggravating and mitigating circumstances is that the State first offer evidence of the statutory aggravating factors listed in G.S. 15A-2000(e). Defendant then offers evidence of mitigating circumstances listed in G.S. 15A-2000(f). Only then is the State entitled to offer evidence intended to rebut defendant's proffered mitigating circumstances. See e.g. State v. Silhan, 302 N.C. 223 , 275 S.E.2d 450 (1981).

The State contends that if it is not allowed to refute a mitigating circumstance in its case in chief, and defendant does not offer any evidence of that mitigating circumstance, then, under State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979), the defendant is entitled to a peremptory instruction on any mitigating circumstance which the evidence shows may exist when the evidence is viewed in the light most favorable to defendant. Such is not the case. Although there is language to that effect in Johnson, that opinion also nonetheless places the burden of raising and proving a mitigating circumstance on the defendant. If the defendant does not offer any evidence to show the existence of a mitigating circumstance, it is clear a fortiori that he does not carry this burden, and thus is not entitled to an instruction on a mitigating circumstance.

We agree with defendant, then, that the admission of testimony offered by the State solely to refute mitigating circumstances upon which defendant might later rely was error. Our inquiry must next be whether that error was prejudicial. We hold that it was not.

Defendant, through seventy-five exceptions grouped under one assignment of error, contends that the admission of this testimony violated his due process rights under the eighth and fourteenth amendments. G.S. 15A-1443(b), the controlling statute, provides as follows:

> (b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

Our careful review of all of the testimony offered and the arguments presented shows that the State has met its burden for two reasons. First, much of the testimony objected to by defendant, in addition to rebutting mitigating circumstances, also was competent as evidence of aggravating circumstances.

For example, the testimony of Jewel Taylor, the prosecuting witness in State v. Taylor, 301 N.C. 164, 270 S.E.2d 409 (1980), decided by this Court last fall, was offered in part to rebut a mitigating circumstance, but it was also admissible to show that "the capital felony [the murder of Mrs. Murchison] was committed for the purpose of avoiding or preventing a lawful arrest . . . ." G.S. 15A-2000(e)(4). Mrs. Murchison's murder was one in a series of actions by defendant through which he sought to avoid capture.

Second, the jury had before it all of the evidence offered at the guilt/innocence phase as well as the additional evidence presented at the sentencing phase. A review of that evidence shows that the jury had before it a clear record of what must be described as this defendant's unconscionable acts toward so many of his victims. Although we recognize the gravity of the sentence which defendant received, we nonetheless, after much careful consideration of the entire record before us, conclude that such error was harmless beyond a reasonable doubt and hold that defendant is not entitled to a new sentencing hearing, nor should his sentence be reduced. This assignment is overruled.

XXII.

Defendant objects to the in-court identification of defendant by witnesses Tina Baker and Robert Rawls as part of their testimony during the penalty phase of the trial. (Assignment number 36). Apparently defendant argues that the State did not disclose information concerning the procedures used when these witnesses made an out-of-court identification, and thus defendant was unable to refute their testimony.

This assignment is without merit. Before the court received the testimony of the two witnesses a voir dire was held. Defendant had every opportunity to test the credibility of the witnesses at that point or to call as witnesses the investigating officers. Failure of the defendant to do so cannot now be a grounds

for reversal. In any event, the trial court concluded that the identification of defendant by each of these witnesses was based upon seeing the defendant on the night of the offenses committed against the witnesses, not upon any pretrial or in-court identification. Such findings are supported by competent evidence and therefore binding on appeal. State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976); State v. Curry, 288 N.C. 660, 220 S.E.2d 545 (1975).

XXIII.

Also received into evidence at the penalty phase of this trial was testimony by William F. Parks, an investigator for the Virginia Beach Police Department, concerning defendant's conviction for the crime of rape. Defendant was convicted in Virginia in 1969 and sentenced to ten years in prison. Defendant complains that testimony about the sentence he received was improperly admitted. (Assignment Number 40).

The State contends that this evidence is admissible to support the aggravating circumstance that "defendant had been previously convicted of a felony involving the use or threat of violence to the person." G.S. 15A-2000(e)(3). We agree. The testimony concerning defendant's sentence would be relevant to show he had been convicted of what would be considered a felony in North Carolina. Nothing else appearing, rape involves the use or threat of violence to the person. We find no error here.

XXIV.

Defendant next objects to the testimony of John D. Butts, a forensic pathologist who performed an autopsy on Kathi King. (Assignment number 41). Defendant was charged with the

3 January 1978 murder of Ms. King and convicted in October of 1978. Our review of that conviction appears at 298 N.C. 405, 259 S.E.2d 502 (1979). Defendant stipulated that he had been found guilty of that murder.

The objection made by defendant is that, as he had stipulated the fact of his prior conviction, the State should not have been allowed to introduce testimony concerning the murder. The State argues that when proving as an aggravating circumstance that defendant was previously convicted of a capital felony or of a felony involving the use or threat of violence to the person (G.S. 15A-2000(e)(2) and (3)), the State should not be limited to admission of the court record of conviction.

We think the better rule here is to allow both sides to introduce evidence in support of aggravating and mitigating circumstances which have been admitted into evidence by stipulation. If the capital felony of which defendant has previously been convicted was a particularly shocking or heinous crime, the jury should be so informed. Conversely, it could be to defendant's advantage that he be allowed to offer additional evidence in support of possible mitigating circumstances, instead of being bound by the State's stipulation.

In Elledge v. State, 346 So. 2d 998 (Fla. 1977), the Supreme Court of Florida addressed the same question. There, as here, appellant's counsel stipulated to the admissibility of a prior conviction of defendant for murder. At the sentencing hearing, the widow of the victim was nonetheless allowed to testify in detail about events surrounding the crime. In deeming the testimony properly admitted, the court said:

> This is so because we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge. It is matter

> that can contribute to decisions as to sentence which will lead to uniform treatment and help eliminate 'total arbitrariness and capriciousness in [the] imposition' of the death penalty. (citation omitted).

Id. at 1001.

This assignment is overruled.

XXV.

By his assignment of error number 45, defendant charges error in the scope of the prosecutor's cross-examination of defendant's witness Marzella Motley. Ms. Motley is defendant's sister, and defendant claims that she was called as a character witness for defendant. As she was a character witness, says defendant, questions asked of her by the district attorney concerning particular acts of misconduct by defendant and questions about her possible bias were improper.

The testimony of Ms. Motley on direct examination was not confined to the issue of character. Under the law in this jurisdiction, character can be proved by the opinion of one who knows the defendant, by reputation or by specific acts. 1 Stansbury's N.C. Evidence (Brandis Rev. 1973) § 110. None of these methods were used in eliciting testimony from the witness. Instead, the witness, on direct examination, testified about defendant's troubled youth, his being sent to a reform school, his marriage and his children. Such wide-ranging testimony, we think, moved her testimony beyond the bounds of merely being a character witness. The expanded breadth of her testimony, under our adversary system, brings with it a concomitant expansion of the scope of permissible cross-examination. Accordingly, this assignment is overruled.

XXVI.

Defendant assigns as error (assignment number 47) the court's permitting the district attorney to cross-examine defendant's psychiatrist using a report about defendant's competency to

stand trial made by a second psychiatrist. The second psychiatrist, Dr. Rollins, was not called at trial, but the State nonetheless used his psychiatric evaluation of defendant to cross-examine defendant's witness Dr. Fisscher.

We agree with defendant that this procedure was improper for the simple reason that it allowed the State to get Dr. Rollins's testimony before the jury at the same time it cross-examined Dr. Fisscher. We do not find reversible error, however, because on redirect examination the defendant asked his witness questions concerning the same report, that is, the one prepared by Dr. Rollins. Thus the improper admission of the testimony was cured when substantially the same evidence was later admitted. See State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976); State v. Little, 278 N.C. 484, 180 S.E.2d 17 (1971); State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971). This assignment is overruled.

XXVII.

Defendant next assigns error to certain of the questions asked by the State on cross-examination of defendant's witness Nathan Rice, the Deputy Warden at Central Prison. (Assignment number 49.) On direct examination, Mr. Rice testified about the various security procedures used to manage the prisoners in Central Prison, and the fact that, if a maximum security prisoner injured or threatened another person in the prison, he would be placed in intensive management--a security level more restrictive than maximum security. Mr. Rice also testified that between defendant's initial confinement in Central Prison and the time of trial, defendant had committed no infractions of prison rules.

On cross-examination, the following colloquy occurred:

> Q. Now, even within - well, let me just ask you this. Insofar as I and J blocks are concerned, would it be fair for this jury to believe that you all have done everything to maximize security with regard to those few inmates there that you possible [sic] can in light of the twentieth century technology that we have today?

MRS. TALLY: Objection, to the form of the question.

THE COURT: Overruled.
EXCEPTION.
THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 231

A. I certainly think so, seeing that we have put close [sic] circuit T.V., monitoring system, placed inmates in individual cells, etc., I think that we have done basically everything that we can to maintain some control over these people.

Q. And even with all of these efforts that you have made with regard to I and J block, you still have instances within I and J block, do you not, in which murders occur, do you not?

MRS. TALLY: Objection, on the grounds of relevancy.

THE COURT: Overruled.
EXCEPTION.
THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 232

A. The last murder we had occurred on a recreation field of I and J.

Q. And that was a man named Cordell Spaulding, who was located in I and J block who had a weapon and killed an inmate even after he's gone through all the security that you've described, did it not?

MRS. TALLY: Objection, on the grounds of relevancy.

THE COURT: Overruled.
EXCEPTION.
THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 233

A. That is correct.

Q. Can you tell the jury what happened in that instance?

MRS. TALLY: Objection on the grounds of relevancy.

THE COURT: Overruled.
EXCEPTION.
THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 234

A. The population on that particular corridor had been turned out to recreate, that being the third tier. They had to come off of the third tier and go down the second tier into a sallyport where he would be given his clothes to put on and then the officer standing by would pull a lever and open the door and, of course, let him out on recreation. In this particular case, all of the people had gone out and been searched and the guy in question was the last one to go out. After he

got his clothes on and got ready to exit the door and the lever had been pulled and the door had been opened, he, being a rather large individual, put his foot against the door and jammed it long enough for another inmate in the block to throw a weapon to him and in spite of the yelling and hollering and spraying mace and so forth to try to get him to stop, he went outside and stabbed another prisoner to death in the recreation field.

Q. How many other people had that man killed in the prison system?

MRS. TALLY: Objection on the grounds of relevancy.

THE COURT: Overruled.
EXCEPTION.
THIS CONSTITUTES DEFENDANT'S EXCEPTION NO. 235

A. That's the second one he's been convicted of.

Defendant charges error in the admission of that line of questioning.

Apparently defendant offered the testimony of Mr. Rice, in part, to assure the jury that, should they recommend a sentence of life, defendant would not be able to harm any of his fellow inmates. The State's cross-examination, using the example of Mr. Spaulding, was designed to refute this contention. While we agree with defendant that the State was allowed to go far in placing before the jury irrelevant evidence of an unrelated crime, we nonetheless cannot find this to be error prejudicial to defendant. The questions excepted to by defendant's exceptions numbered 231 and 232 appearing in the foregoing quotation were clearly competent and within the scope of permissible cross-examination. Given that, we cannot say that the trial judge's rulings on the succeeding exceptions rise to the level of prejudicial error.

XXVIII.

Assignment of error number 50 presents the question of whether the trial court erred in excluding testimony by defense witnesses on the religious, ethical, legal and public policy perspectives of capital punishment. Various witnesses would have testified that capital punishment does not deter crime, that

capital punishment is contrary to the Scriptures and general religious principles, and that capital punishment is imposed in a racially discriminatory and inconsistent fashion. We hold that the trial court acted properly in excluding the testimony.

This issue has previously been before us. In State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), defendant offered similar evidence: affidavits saying that innocent people were sometimes executed, that capital punishment did not deter crime, and that capital punishment was objectionable on religious grounds. In Cherry, we rejected defendant's contentions that G.S. 15A-2000(a)(3) in effect altered the usual rules of evidence or impaired the trial judge's power to rule on the admissibility of evidence. Instead, we made it clear in Cherry that factors to be considered in sentencing are "the defendant's age, character, education, environment, habits, mentality, propensities and record." (Emphasis in original). Id. at 98, 257 S.E.2d at 559.

Beyond that, evidence such as that offered in Cherry and here is totally irrelevant and of no probative value as mitigating evidence in the sentencing phase of defendant's trial. We recognize that 15A-2000(f) states that the statutory list of mitigating factors is not exclusive, but that does not give defendant carte blanche to offer evidence having no direct connection with this defendant. Any evidence allegedly probative on the issue of mitigating factors must also be, in the view of the court, relevant. Evidence such as that offered here is not. This assignment is overruled.

XXIX.

Nor was there error in the trial court's refusing to submit a specific verdict form to the jury as proposed by the defendant. (Assignment number 52). To begin with, defendant's proposed form did not expressly mention the possible mitigating circumstances, which we said in State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979), would be the preferred practice.

Second, we find no merit in defendant's contention that since the jury had to answer each aggravating circumstance specifically but did not have to answer which mitigating circumstances they found, that placed undue emphasis on the aggravating circumstances. The judge's instructions made clear to the jury the proper method for weighing the aggravating and mitigating circumstances in reaching its verdict. We presume the jury followed those instructions. This assignment is overruled.

XXX.

Defendant's conviction of first degree murder at this trial was based upon the felony murder rule. The underlying felony was the robbery of Mrs. Murchison. One of three aggravating circumstances submitted to the jury was as follows: Was this murder committed while Norris Carlton Taylor was engaged in the commission of the felony of robbery? The jury replied in the affirmative. Defendant assigns as prejudicial error the submission of this aggravating circumstance. (Assignment number 53).

We agree with defendant that the trial court erred in submitting this aggravating circumstance. As we said in State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), "when a defendant is convicted of first degree murder under the felony murder rule, the trial judge shall not submit to the jury at the sentencing phase of the trial the aggravating circumstance concerning the underlying felony." Id. at 113, 257 S.E.2d at 568. However, nothing in Cherry or any of our other decisions states that such an error is prejudicial per se. Our next inquiry, then, is whether the error here was prejudicial.

In assessing whether the erroneous submission of this aggravating circumstance was harmless error, this Court has previously stated that the proper test is whether there is a reasonable possibility that the evidence complained of might

have contributed to the imposition of the death penalty. State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979). In Goodman, we found submission of the underlying felony to be error largely because of the highly questionable quality and credibility of the State's primary evidence. We found similar prejudicial error in State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979) simply because we were unable to say that under the facts of that particular case the submission of the underlying felony constituted harmless error. In Cherry, absent the erroneously submitted aggravating circumstance, we could not say that the jury would have decided that the aggravating circumstances were "sufficiently substantial to call for imposition of the death penalty." 298 N.C. at 114, 257 S.E.2d at 568.

Contrasting those two decisions with the case before us, we note at the outset that the State offered overwhelming and conclusive proof that the defendant committed all of the crimes with which he was charged. Several eyewitnesses testified about the robbery and murder of Mrs. Murchison. Malcolm Biles survived his wounding at the hands of defendant and testified about his abduction, robbery and assault. Patty Bazemore, who basically accompanied defendant throughout the course of these events, also testified about events within her personal knowledge. Other witnesses for the State offered additional pieces of information, which when connected, gave the jury a clear and concise account of defendant's actions. As a result, we are not troubled by the quality of the State's evidence as we were in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

Nor do we feel we are unable to say that submission of the underlying felony here was harmless error. In contrast to Cherry, we are here convinced that the error was harmless beyond a reasonable doubt and that the result of the weighing process used by the jury would not have been different had the impermissible

aggravating circumstance not been present. Our review of the voluminous evidence offered by the State convinces us that submission of the aggravating circumstance that the murder was committed while committing the robbery was not prejudicial error.

Most instructive in reaching this conclusion is a comparison of the record in the sentencing phase in Cherry with the record in this case. In Cherry, defendant, in the course of robbing a store, shot and killed an employee of that store. There was some evidence that the victim and defendant struggled over the gun, and the gun discharged, fatally wounding the victim. The jury found defendant guilty of first degree murder.

At the penalty phase of Cherry's trial, the State offered as additional evidence of aggravating circumstances only the stipulation that defendant had a prior conviction for armed robbery. Defendant offered the testimony of his mother, father, wife and a good friend as evidence of mitigating circumstances. The State offered no rebuttal. The jury found three aggravating circumstances and recommended the death penalty. This Court, fearing that the erroneous submission of the underlying felony as an aggravating circumstance might have tipped the balance in the jury's decision to impose the death penalty, remanded the case for a new sentencing hearing.

In contrast, the record in the case now before us contains extensive testimony offered at the sentencing phase in support of several of the statutory aggravating circumstances. A brief overview of the evidence should demarcate with sufficient clarity the enormous factual qualitative and quantitative differences between the evidence offered in Cherry and the evidence offered in this case.

Patricia Ann Sullivan testified that on 30 August 1978 she was kidnapped by defendant at knife point, that she was able to escape from defendant and that he shot at her as she ran. The

murder of Mrs. Murchison occurred two days later. Ms. Sullivan's testimony was therefore admissible under G.S. 15A-2000(e)(4), because the murder of Mrs. Murchison may have been committed "for the purpose of avoiding . . . a lawful arrest." Id. Defendant had for several days prior to the murder been stealing cars and moving about the countryside. Mrs. Murchison's murder was simply one part of defendant's flight to avoid arrest.

In a similar vein, the testimony of Richard Lee Taylor, that he was kidnapped by defendant, was admissible as evidence that the murder of Mrs. Murchison was one chapter in defendant's efforts to avoid capture. Jewel Taylor, the prosecuting witness in an earlier case involving this defendant, was likewise properly allowed to testify about her abduction and mistreatment at the hands of defendant. The events involving Ms. Taylor occurred on 28 and 29 August 1978 and included driving the defendant to Petersburg, Virginia. Her testimony was therefore relevant as evidence of defendant's ongoing efforts to avoid capture.

Other testimony, including defendant's admission of other crimes to police officers, was properly offered and received as also supporting the State's theory that the capital felony was committed for the purpose of avoiding a lawful arrest.

In addition to considering the evidence supporting the proffered aggravating circumstances, the jury was of course aware of the evidence offered at the guilt/innocence phase of the trial. Thus, even though the submission of the underlying felony was error, overwhelming evidence supporting other statutory aggravating factors convinces us that the weighing process has not been compromised. Compare Elledge v. State, 346 So.2d 988 (Fla. 1977) with Brown v. State, 381 So.2d 690 (Fla. 1980), cert. denied _____ U.S. _____, 101 S.Ct. 931, 66 L.Ed 2d 847 (1981). Accordingly, this assignment is overruled.

XXXI.

Defendant's assignment of error number 54 alleges error in the trial court's instructing the jury that they could consider as an aggravating circumstance that the murder was committed for pecuniary gain. Defendant argues that since the felony underlying a felony murder conviction cannot be submitted as an aggravating circumstance, instruction on any element of that felony is also precluded. Defendant relies on State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979), for the proposition that the submission of two aggravating circumstances arising from the same act was error.

We need not pause to distinguish defendant's Goodman argument, because we have recently resolved this question in State v. Oliver, 302 N.C. 28 , 274 S.E.2d 183 (1981). In Oliver, in discussing whether pecuniary gain was improperly submitted as an aggravating circumstance, we said:

> Neither is there any error in submitting this circumstance in a felony murder case in which the underlying felony is robbery notwithstanding the rule that the robbery itself cannot be submitted as such a circumstance. The robbery constitutes an essential element of felony murder. In a capital case tried solely on the felony murder theory a jury, in absence of this element, could not find defendant guilty of the capital offense. (Footnote omitted). The circumstance that the capital felony was committed for pecuniary gain, however, is not such an essential element. This circumstance examines the motive of the defendant rather than his acts. While his motive does not constitute an element of the offense, it is appropriate for it to be considered on the question of his sentence.

Id. at 62 , 274 S.E.2d at 204.

This assignment is overruled.

XXXII.

Assignment of error number 57 is addressed to the trial court's instructions on the mitigating circumstances found in G.S. 15A-2000(f)(2) and (6) -- mental or emotional disturbance and impaired capacity of the defendant. On those issues, the court instructed the jury as follows:

> Consider whether this murder was committed while Norris Carlton Taylor was under the influence of mental or emotional disturbance.
>
> A defendant is under such influence even if it does not justify or excuse his killing, if he is in any way affected or influenced by a mental or emotional disturbance.
>
> There has been some evidence in this case to the effect that the defendant was suffering from paranoid psychosis. I say to you that that would be a mental disturbance.
>
> The second matter which you should consider under Issue No. 3 is whether or not Norris Carlton Taylor's capacity to conform his conduct to the requirements of the law was impaired.
>
> The defendant's capacity to conform is impaired even if his killing is not justified or excused, and even if he is able to appreciate the criminality of his conduct if he is for any reason less able than a normal person to do what the law requires, or to refrain from what the law forbids. (R p 468).

Relying in large part on the decision of this Court in State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979), defendant alleges these instructions were prejudicially inadequate.

Defendant is correct that in Johnson we found error in the trial court's cryptic reference to the mitigating circumstances enumerated in G.S. 15A-2000(f)(6). But that holding does not control the result here. To begin with, defendant in Johnson pleaded guilty to first degree murder. Furthermore, defendant did not have a defense of insanity under the laws of this State, but there was abundant evidence of defendant's schizophrenia. As defendant could not rely on a defense of insanity in the guilt phase of the trial, because he was not insane under the M'Naghten test, defendant relied heavily on the mitigating circumstance of G.S. 15A-2000(f)(6) to convince the jury that he should be sentenced to life imprisonment rather than death. On that state of the record, then, we said it was "fair to say that this mitigating circumstance was almost 'the whole case' so far as defendant was concerned on the question of punishment." Id. at 69, 257 S.E.2d at 614. Given that, and the complexity of the psychiatric evidence offered by

defendant, we could only conclude in Johnson that defendant was entitled to a fuller instruction on that issue.

Based on our examination of the record now before us, we conclude that the trial judge's instructions were sufficient to explain the law arising on the evidence. Defendant's expert psychiatric testimony established that defendant did know right from wrong, but that defendant was under the influence of a mental or emotional disturbance at the time of the offense, and that defendant suffered from impaired capacity to conform his conduct to the requirements of the law at the time of the offense. As in Goodman, we find this instruction sufficient on the facts of this case. The jury was instructed that, in order to find a mitigating circumstance, they must find by a preponderance of the evidence that defendant was "in any way affected or influenced by a mental or emotional disturbance." The jury could find a second mitigating circumstance if it determined that the defendant "was for any reason less able than a normal person to do what the law requires or to refrain from what the law forbids." Those instructions were sufficient on the evidence offered. This assignment is overruled.

XXXIII.

Defendant offers numerous other assignments, most of which have either previously been answered by this Court or are spurious at best. They are dismissed without discussion.[2]

In order to be certain that the death penalty is not imposed randomly or capriciously, this Court is directed by statute

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[2]All assignments of error brought forward by defendant have been carefully scrutinized by this Court. We elect not to discuss many of them because they involve questions of law well-settled by our earlier opinions, are merely formal objections, or else are so clearly meritless that we see no point in cluttering the pages of our reports with a recitation of their content. Accordingly, the following assignments of error are dismissed, after thorough review, without discussion: 13, 22, 29, 30, 31, 32, 34, 37, 38, 39, 42, 43, 44, 46, 48, 51, 55, 56, 58, 59 60, 61, 62.

to review the record in a capital case to determine whether the record supports the jury's finding of any aggravating circumstance, whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. G.S. 15A-2000(d); see State v. Martin, _____ N.C. _____, 278 S.E.2d 214 (1981); State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980); State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979).

We have carefully reviewed a record of approximately five hundred pages, briefs totaling over three hundred eighty pages, and the defendant's sixty-two assignments of error. After full and cautious deliberation, we conclude that there is sufficient evidence in the record to support the findings of the jury and its determination of sentence based thereon. There is nothing in the record to indicate that the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor.

While the jury can consider all evidence properly presented to it at trial in reaching a determination as to punishment, (G.S. 15A-2000(a)(3)), that evidence can only be considered insofar as it supports a finding of an aggravating circumstance. G.S. 15A-2000(c). Here the jury had before it clear evidence that defendant had been previously convicted of a felony involving the use or threat of violence to the person. The jury also properly determined that the murder was committed for pecuniary gain. Given those facts, and that the murder of Mrs. Murchison was, simply put, a cold-blooded killing of an innocent woman on her way to work, we see no reason to reverse the judgment of the jury. The sentence of death is not excessive or disproportionate, considering both the crime and the defendant. We, therefore, decline to exercise our authority to set aside the sentence imposed.

For the reasons stated above, we hold that defendant is

entitled to a new trial on the kidnapping charge. In all other respects, defendant had a fair trial, free from prejudicial error. In the convictions of first degree murder, armed robbery and assault with a deadly weapon inflicting serious bodily injury, we find no error.

Case No. 79 CRS 6425, First degree murder, NO ERROR.

Case No. 79 CRS 6426, Aggravated kidnapping, armed robbery, assault with a deadly weapon with intent to kill inflicting serious bodily injury, REVERSED AND REMANDED IN PART FOR A NEW TRIAL ON THE KIDNAPPING CHARGE ONLY--NO ERROR OTHERWISE.

Justice Exum concurring in part and dissenting in part.

I concur in the result reached by the majority on the guilt phase of this case.

I am unable to join, however, in the majority's conclusion that the cumulative effect of the several errors acknowledged by the majority to have been committed in the sentencing phase was not prejudicial. In face of these errors and with his life hanging in the balance, defendant is entitled to a new sentencing hearing.

Also, for the reasons stated in my dissent in State v. Rook, ___ N.C. ___, ___ S.E. 2d ___ (No. 2, Fall Term 1981, filed 3 November 1981), I believe it to be prejudicial error not to require the jury to specify those mitigating circumstances which it finds to exist. For this additional reason defendant is entitled to a new sentencing hearing.

My vote, therefore, is to remand the case for a new sentencing hearing.

NO. 81 - 5962

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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SUPREME COURT, U.S.

NORRIS CARLTON TAYLOR,
Petitioner,

- against -

STATE OF NORTH CAROLINA,
Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Norris Carlton Taylor, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of North Carolina without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Mr. Taylor's affidavit in support of this motion is attached hereto.

Mary Ann Tally

MARY ANN TALLY
Suite 307, 117 Dick Street
Fayetteville, N.C. 28301
ATTORNEY FOR PETITIONER

NO. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

NORRIS CARLTON TAYLOR,
Petitioner

- against -

STATE OF NORTH CAROLINA,
Respondent

I, Norris Carlton Taylor, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf as court-appointed counsel in her position as Public Defender of the Twelfth Judicial District, State of North Carolina, without remuneration. At trial, and on appeal, lawyers have been appointed to represent me because I am indigent.

5. I believe that I am entitled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in the Superior Court of New Hanover County, a trial court of the State of North Carolina, of murder and armed robbery and was sentenced to death. I am being held at the North Carolina Central Prison in Raleigh, North Carolina. I believe that errors were committed during the course of my trial in violation of my constitutional rights and that my conviction and death sentence

were imposed upon me in violation of my constitutional rights.

Norris C. Taylor
NORRIS CARLTON TAYLOR

STATE OF NORTH CAROLINA
COUNTY OF WAKE

The foregoing affidavit of Norris Carlton Taylor was subscribed and sworn to before me this 4th day of December, 1981.

Robert O. Campen
Notary Public

My commission expires: My Commission Expires 5-21-85

JAN 28 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 81-5962

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NORRIS CARLTON TAYLOR,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

I. WERE THE DEFENDANT'S FIFTH OR SIXTH AMENDMENT RIGHTS VIOLATED WHEN THE PROSECUTOR WAS GIVEN ACCESS TO A PSYCHIATRIC REPORT WHICH WAS USED IN CROSS-EXAMINING A DEFENSE EXPERT DURING TESTIMONY WHEN THE REPORT HAD BEEN PREPARED PURSUANT TO MENTAL EXAMINATIONS REQUESTED BY THE DEFENDANT TO DETERMINE THE DEFENDANT'S CAPACITY TO STAND TRIAL AND TO EXPLORE THE POSSIBILITY OF THE EXISTENCE OF MITIGATING CIRCUMSTANCES?

II. DID THE TRIAL COURT'S REFUSAL TO REQUIRE THE JURY TO LIST ON THE VERDICT SHEET WHICH MITIGATING CIRCUMSTANCES THE JURY FOUND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS?

III. MUST THE DEFENDANT'S SENTENCE OF DEATH BE VACATED BECAUSE ONE OF THREE AGGRAVATING CIRCUMSTANCES FOUND BY THE JURY WAS SET ASIDE BY THE APPELLATE COURT?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-5962

NORRIS CARLTON TAYLOR,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT
STATE OF NORTH CAROLINA
IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

Pursuant to the authority of Rule 22 and in the manner provided by Rule 46.5 of the Supreme Court Rules, the State of North Carolina responds to the petition of Norris Carlton Taylor and requests that this Court deny the petition on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

Norris Carlton Taylor was tried, convicted, and received a sentence of death in the Superior Court of New Hanover County. In an opinion reported in State v. Taylor, ___ N.C. ___, 283 S.E. 2d 761 (1981), the Supreme Court of North Carolina found no error in the conviction and affirmed the judgment of death.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. WERE THE DEFENDANT'S FIFTH OR SIXTH AMENDMENT RIGHTS VIOLATED WHEN THE PROSECUTOR WAS GIVEN ACCESS TO A PSYCHIATRIC REPORT WHICH WAS USED IN CROSS-EXAMINING A DEFENSE EXPERT DURING TESTIMONY WHEN THE REPORT HAD BEEN PREPARED PURSUANT TO MENTAL EXAMINATIONS REQUESTED BY THE DEFENDANT TO DETERMINE THE DEFENDANT'S CAPACITY TO STAND TRIAL AND TO EXPLORE THE POSSIBILITY OF THE EXISTENCE OF MITIGATING CIRCUMSTANCES?

II. DID THE TRIAL COURT'S REFUSAL TO REQUIRE THE JURY TO LIST ON THE VERDICT SHEET WHICH MITIGATING CIRCUMSTANCES THE JURY FOUND VIOLATE THE DEFENDANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS?

III. MUST THE DEFENDANT'S SENTENCE OF DEATH BE VACATED BECAUSE ONE OF THREE AGGRAVATING CIRCUMSTANCES FOUND BY THE JURY WAS SET ASIDE BY THE APPELLATE COURT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States:

AMENDMENT V (in relevant part)

No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

AMENDMENT VI (in relevant part)

In all criminal prosecutions, the accused shall enjoy the right to...have the assistance of counsel for his defense.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> "§15A-2000(b) Sentence Recommendation by the Jury. - Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.
>
> After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:
>
> (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;
> (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and
> (3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.
>
> The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.
>
> If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation."

"§15A-2000(c) Findings in Support of Sentence of Death- When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and
(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,
(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found."

STATEMENT OF THE CASE

On September 1, 1978, Norris Carlton Taylor, an escapee from the Johnston County Jail where he was being held for the murder of Kathiline Ann Mansullo aka Kathy King (R. 345-347)[1], and a fugitive from Virginia for a series of kidnappings, robberies, assaults, and a murder (R. 352-371), was arrested in Woodland, North Carolina after a high speed chase and was charged with, among other things, the murder and armed robbery of Mildred Murchison (who was four months pregnant) (R. 167), and the kidnapping of, armed robbery of, and assault with intent to kill inflicting serious bodily injury on Malcolm Biles, all of which occurred September 1, 1978 (R. 10). Taylor was also charged with the August 28, 1978 kidnapping and rape of Jewel Taylor.[2]

On September 5, 1978, Norris Taylor was found to be indigent and the Public Defender of Cumberland County was appointed to represent him (R. 1).

On January 8, 1979, the petitioner's counsel petitioned the court to have Taylor evaluated for competency to stand trial,

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[1]Taylor was later convicted of the first degree murder of Kathiline Mansullo: State v. Taylor, 298 N.C. 405, 259 S.E. 2d 502 (1979).

[2]Taylor was later convicted on these charges, but the North Carolina Supreme Court reversed as to the kidnapping charge: State v. Taylor, 301 N.C. 164, 270 S.E. 2d 409 (1980).

for the presence of any mitigating circumstances, and for a possible insanity defense. (R. 268-269). The court granted the petition and ordered that Taylor be evaluated by Dr. Bob Rollins, Chief of the Forensic Psychiatric Services for the State of North Carolina, who submitted a report to petitioner's counsel and a letter to the court pursuant to G.S. §15A-1002(d). Taylor was found competent to stand trial.

On March 5, 1980 true bills of indictment were returned by the Cumberland County Grand Jury charging Norris Carlton Taylor with the murder and armed robbery of Mrs. Murchison (78 CRS 41453) and the kidnapping of, armed robbery of, and the assault with a deadly weapon with intent to kill, inflicting serious bodily injury on Malcolm Biles (78 CRS 6426). These cases were consolidated for trial, and, on January 30, 1979, the court granted the petitioner's motion for a change of venue, and ordered the cases transferred to New Hanover County for trial. (R. 57).

On May 28, 1979 Norris Carlton Taylor was brought to trial. The State presented evidence showing the following: On August 30, 1978, Patty Bazemore was accosted by the petitioner in Woodland, North Carolina. At gunpoint, he forced her to drive with him, in her automobile, to Fayetteville, where they spent the night in a park. The next day petitioner told Bazemore that they would leave her car and try to obtain another, because petitioner was afraid the police would be looking for the Bazemore automobile. Petitioner was unsuccessful in his efforts to secure another car, and that night, August 31, 1978, Bazemore and petitioner slept on a railroad track. On the morning of September 1, 1978, petitioner left Bazemore in a downtown park, warning her not to move, and went to obtain a car.

Clarence Edward Davis testified for the State that he was in the parking lot of the Cardinal Building in Fayetteville on

the morning of September 1, 1978. As he watched, he saw a man whom he identified as petitioner come out from behind a building, cross a wall and approach a young woman, later identified as Mrs. Murchison, who had just parked her car. Davis testified that the two argued, the petitioner apparently wanting her pocketbook and car keys. As Mrs. Murchison turned away, Davis said he heard two gunshots and saw Mrs. Murchison stagger. Petitioner fled in Murchison's car, a tan 1976 Buick Electra 225 with two doors, passing within fifteen to twenty feet of Davis.

Petitioner then returned to where he had left Bazemore and ordered her into the car. Within five minutes petitioner and Bazemore abandoned the car, went to the bus station nearby and took a taxi to the Eutaw Shopping Center. Across the street from the shopping center was a Winn Dixie grocery store, and in the parking lot of that store defendant approached Malcolm Biles. Petitioner told Biles that he had had car trouble, and Biles offered to help. Once in Biles' car, a 1974 Cadillac Coupe de Ville, petitioner brandished a handgun and ordered Biles to drive. After driving for a time, petitioner ordered Biles to stop the car. Petitioner then locked Biles in the trunk of the car and began driving. Biles became uncomfortable in the trunk and began to make noise by beating on the trunk with the tire iron. Petitioner stopped the car, ordered Biles into the back seat, and drove on. A short time later petitioner turned off onto a dirt road, forced Biles into the woods and shot him.

Petitioner then drove into the town of Woodland, North Carolina, and released Patty Bazemore. As petitioner drove out of town, he was observed by Roosevelt Britt, a part-time Woodland police officer. Petitioner was captured after a high-speed chase and taken to the Sheriff's Department in Jackson, North Carolina.

Just prior to the close of the State's evidence, the court conducted a competency hearing. Over the objection of the petitioner, the court permitted the prosecutor to have a copy of Rollins' report concerning his mental examination of Taylor.

The petitioner was declared competent to proceed with the trial, and elected to put on no evidence. The jury found the petitioner guilty of the first degree murder of Mrs. Murchison on the basis of the felony murder rule with the armed robbery being the underlying felony, and the kidnapping, armed robbery, and assault with a deadly weapon with intent to kill on Malcolm Biles. The court then held a sentencing hearing.

The State presented evidence showing the petitioner's 1969 conviction in the Commonwealth of Virginia for the rape of Susie Crews (R. 344), the murder of Alberta Updike in November, 1975 in Virginia (confessed to by Taylor) (R. 352, 376-383), the aiding and abetting the rape of Sandra Johnson in March, 1976 in Virginia by Taylor (R. 355), the attempted robbery and assault with a deadly weapon on Renee Hinton in March, 1976 by Taylor (R. 359), and Taylor's fleeing to North Carolina to evade arrest on that charge (R. 358,369); the rape, kidnapping and assault with a deadly weapon on Tina Baker and the kidnapping and assault with a deadly weapon on Robert Rawls by Taylor; the January 2, 1978 murder of Kathy King in Selma, North Carolina by Taylor (R. 366) and his subsequent conviction for that offense (R. 345); his fleeing to Virginia to evade arrest for the King murder and subsequent arrest in Newport News, Virginia (R. 369); the escape by Norris Carlton Taylor from the Johnston County, North Carolina jail where he was being held, by use of a deadly weapon on July 14, 1978 (R. 347,369); the August 28, 1978 kidnapping and repeated raping of Jewel Taylor by petitioner (R. 373-376), the August, 1978 kidnapping and robbery of Richard Lee Taylor in Virginia by the petitioner (R. 321); the August 30, 1978

kidnapping, robbery and attempted rape of Patricia Ann Sullivan in Virginia by the petitioner (R. 315-319), and the August 30, 1978 kidnapping, robbery and rape of Patricia Bazemore in Woodland, North Carolina by the petitioner (R. 215-227). There was also evidence presented that these repeated acts of violence and Mrs. Murchison's death and Malcolm Biles' kidnapping, robbery, and assault were all part of an attempt by the petitioner to avoid or prevent a lawful arrest or to effect his escape from custody.

The petitioner put on evidence in mitigation through Dr. Rolf Fisscher, who had examined Taylor, that Norris Taylor was emotionally or mentally disturbed at the time the capital felony was committed, and that his capacity to conform his conduct to the requirements of law at the time of the offense was impaired. The District Attorney cross-examined Fisscher using Dr. Rollins' report concerning Taylor's competency (R. 413-421). After presenting further evidence in mitigation, the defense rested.

The court instructed the jury concerning the jury's duty to determine punishment and gave the jury a written verdict form to complete. The jury was told that it need not indicate on the form which mitigating circumstances it found (R. 477). The jury found three statutory aggravating circumstances existed: that Taylor had previously been convicted of a felony involving the use or threat of violence to the person; that the murder was committed while Norris Taylor was engaged in the commission of the felony of robbery, and that the murder was committed for pecuniary gain (R. 476). The jury also found one or more mitigating circumstances existed (R. 477). The jury then found the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, and the mitigating circumstance or circumstances were insufficient to outweigh the aggravating circumstances. (R. 477). The jury

recommended imposition of the death penalty as to the murder; therefore, the court imposed a sentence of death.

On appeal to the North Carolina Supreme Court, the Supreme Court ruled that one of the statutory aggravating factors found had been improperly submitted to the jury, but ruled the submission harmless error. Likewise, the Court ruled that certain evidence had been improperly submitted during the penalty phase, but found that to be harmless error as well: State v. Taylor, ____ N.C. ____, 283 S.E. 2d 761 (1981).

REASONS WHY THE WRIT

SHOULD NOT ISSUE

1. ESTELLE V. SMITH, _____ U.S. _____, 101 S.Ct. 1866, 68 L.Ed. 2d 359 (1981) DOES NOT REQUIRE THAT A PETITIONER WHO REQUESTS PSYCHIATRIC EXAMINATION BE WARNED THAT THIS STATEMENTS TO THE PSYCHIATRIST WOULD BE USED AGAINST HIM. LIKEWISE, THERE IS NO CONSTITUTIONAL ERROR IN THE STATE'S HAVING ACCESS TO THE REPORT OF THE PSYCHIATRIST WHO EXAMINED THE PETITIONER UNDER THOSE CONDITIONS.

As the first prong of his three part argument that this Court should grant certiorari to review his case, Norris Carlton Taylor argues that his case presents a question about the implication and reach of Estelle v. Smith, ____ U.S. ____, 68 L.Ed. 2d 359, 101 S.Ct. 1866 (1981), and further that the use by the State of psychiatric reports made by a State psychiatrist to cross-examine another psychiatrist constitutes constitutional error. However, since the matter now before the Court is so dissimilar to Estelle v. Smith, supra, and since any error in the prosecutor's use of the report was harmless, this Court ought not issue its writ to review these issues.

Estelle v. Smith, supra dealt with the situation where Smith was compelled by court order to have a psychiatric

examination. He did not ask for it. The State then used the results obtained as a part of the examination as direct evidence during the penalty phase on the issue of the petitioner's future dangerousness. The petitioner in Estelle v. Smith, supra, had put on no evidence in regard to mental capacity.

In the situation now before the Court, the petitioner requested an examination on competency, on possible mitigating factors, and on possible insanity defense. During the penalty phase of the trial, the petitioner put on evidence of his mental condition in order to show the mitigating circumstances of the capital felony's having been committed while the defendant was under the influence of mental or emotional disturbance: G.S. §15A-2000(f)(2), and the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired: G.S. §15A-2000(f)(6). Only on cross-examination of the defense psychiatric expert, after an attempt by petitioner to prove the existence of these mitigating factors, did the State employ the State psychiatrist's report.

The Fifth Amendment to the Constitution states no one shall be compelled to be a witness against himself. However, that right, like any right, may be waived. In Conquest v. Mitchell, 618 F.2d 1057 (4th Cir. 1980), cert. denied, 449 U.S. 878 (1980), Judge Haynsworth, in his concurrance, stated that when a prisoner voluntarily submits to examination by a psychiatrist for the State, as opposed to being involuntarily examined [see Gibson v. Zahradnick, 581 F.2d 75 (4th Cir. 1978)], he has waived his Fifth Amendment privilege. However, the State of North Carolina does not rely solely on the request for examination to prove waiver. In Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981), a case relied on heavily by petitioner,

the Court, while not finding waiver in the request for the examination, stated that waiver of the Fifth Amendment privilege would be found when--as in the matter now before this Court--the petitioner put on evidence of mental condition. The Court stated:

> "A different situation was present in United States v. Cohen, 530 F.2d 43 (5th Cir.), cert. denied 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed. 2d 130 (1976). In Cohen, the federal government used the results of a court-appointed psychiatric examination only after the defense had introduced psychiatric testimony in order to raise a mental defense. In this situation, this Court held that the introduction by the defense of psychiatric testimony constituted a waiver of the defendant's Fifth Amendment privilege in the same manner as would the defendant's election to testify at trial. Cohen, like virtually every other federal and state court addressing this issue, concluded that any burden imposed on the defense by this result is justified by the State's overwhelming difficulty in responding to the defense psychiatric testimony without its own psychiatric examination of the accused and by the need to prevent fraudulent mental defenses." 655 F.2d at 701-702.

Thus, even under the Fifth Circuit's interpretation of Estelle, the petitioner waived his Fifth Amendment privilege in regard to the results of his psychiatric examination when he put on his evidence of mental problems during the penalty phase of the trial.

The petitioner also complains of the manner of the prosecutor's use of the psychiatric report--that by injecting hearsay into the penalty phase, the petitioner's constitutional rights were violated. However, as noted in State v. Taylor, ____ N.C. ____, 283 S.E. 2d 761 (1981), the evidence elicited by the improper use of the reports was elicited in that manner by the defense as well as the prosecution. Thus, the evidence of which the petitioner complains was introduced by him as well as by the State. This, then, is clearly harmless error beyond a reasonable doubt, to the extent it can even be considered a violation of any constitutional right possessed

by the petitioner. Chapman v. California, 365 U.S. 610, . 5 L.Ed. 2d 828, 81 S.Ct. 776 (1965).

Therefore, since the matter now before the Court is so dissimilar to Estelle v. Smith, supra, and since any error in the use of the evidence complained of is harmless, there is no reason for this Court to issue its writ to review these matters.

2. THERE IS NO CONSTITUTIONAL REQUIREMENT PURSUANT TO THE EIGHTH AND FOURTEENTH AMENDMENT THAT THE JURY SPECIFY ON THE VERDICT FORM WHICH MITIGATING CIRCUMSTANCES THE JURY FOUND.

The petitioner, in requesting that this Court's writ issue to the Supreme Court of North Carolina, argues that the trial court's failure to require that the jury list on the verdict form which mitigating circumstances it found results in a denial of his Constitutional rights. Such an assertion is meritless and ought not be the basis for this Court to grant certiorari.

At the outset, it should be noted what is--and what is not--at issue. The jury instructions in State v. Taylor, supra, as well as the North Carolina statutory scheme, G.S. §15A-2000 (b), require the sentencing jury to consider each of the mitigating circumstances which could conceivably arise from the evidence (R. 462-463). Thus, the requirement of Lockett v. Ohio, 438 U.S. 586, 57 L.Ed. 2d 973, 98 S.Ct. 2954 (1978), that a sentencer in a capital case must not be precluded from consideration of relevant mitigating factors, is met in this case.

What is at issue is simply whether the jury must, after finding mitigating factors, specifically record each factor on the verdict sheet instead of indicating generally that mitigating circumstances were found. Neither North Carolina law nor the United States Constitution require such a listing by the jury. G.S. §15A-2000(d); State v. Rook, ____ N.C. ____, 283 S.E. 2d 756 (1981).

In Gregg v. Georgia, 428 U.S. 153, 49 L.Ed. 2d 859, 96 S.Ct. 2909 (1976); Proffitt v. Florida, 428 U.S. 242, 49 L.Ed. 2d 913, 96 S.Ct. 2960 (1976); and Jurek v. Texas, 428 U.S. 262, 49 L.Ed. 2d 929, 96 S.Ct. 2950 (1976), this Court approved the

death penalty statutes from Florida, Texas, and Georgia which provided the sentencer with what this Court felt was constitutionally permissible limited and guided discretion. These statutes, while in some aspects different from each other, all required the finding of certain elements in aggravation and consideration of any possible elements in mitigation. These statutes also require judicial review of all aspects of the sentencing.

Neither the Texas nor the Georgia statutes nor the case law interpreting these statutes require a specific listing by the jury of each mitigating factor found: GA. Code Ann. §27-2534.1(c); TEXAS CODE CRIM. PRO. 37.071.

In Texas, in fact, the statute does not even explicitly speak of mitigating circumstances, but rather directs the jury to answer three questions regarding punishment after certain aggravating circumstances had been found to exist by virtue of a guilty verdict. The Court found that in reaching the answers to the questions, evidence in mitigation would be considered, and that that was enough to render the statute constitutional. Jurek v. Texas, supra.

The petitioner argues that the North Carolina statutory scheme whereby aggravating circumstances must be specifically listed and mitigating circumstances not listed renders the appellate proportionality review constitutionally inadequate. However, the North Carolina statutory scheme is strikingly similar to Georgia's death penalty statute: State v. Rook, supra, and the Georgia statute, upheld by this Court in Gregg v. Georgia, supra, requires no written findings of mitigating factors, although it does require specific written findings of the aggravating circumstances: GA. Code Ann. §27-2534.1(c) (1978).

It follows that if Georgia's statute and Texas' statute, both found constitutional by this Court, require no written

findings of each mitigating circumstance found by the jury, there is no constitutional requirement for North Carolina to require the jury to list each mitigating factor the jury may find. As stated by Justice Carlton, speaking for the Court in State v. Rook, supra:

> "On appeal, the Georgia Supreme Court is required to review the sentencing procedure to determine:
>
> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
> (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> Ga. Code Ann. §27-2537(c)(1978). Thus, because the Georgia statute requires specific findings only on aggravating circumstances, appellate review of the above-listed issues is limited to a consideration of the facts of the crime and the aggravating circumstances found by the jury.
>
> As stated above, the United States Supreme Court has examined the Georgia procedure for imposition of the death penalty and found it to be constitutional. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859. Our statutory scheme is strikingly similar to Georgia's, in that our sentencing review is limited to a consideration of the circumstances of the crime and the aggravating circumstances found by the jury. Georgia's scheme has been fully reviewed by the United States Supreme Court and has been declared constitutional; our statute is likewise constitutional. It follows, then, that there exists no constitutional requirement of specific findings on mitigating circumstances and that failure of the trial court to instruct the jury to make specific findings was not error."

Therefore, the Respondent State of North Carolina submits that a writ of certiorari should not issue to review this matter.

involves whether or not one aggravating factor which was found from the evidence for sentencing ought not to have been submitted to the jury. None of the evidence which was used to reach the legal conclusion as to the presence of the statutory aggravating circumstance was rendered inadmissible by the Appellate Court's finding that G.S. §15A-2000(e)(5) ought not to have been charged upon. All that evidence was relevant for the purpose of finding G.S. §15A-2000(e)(6), that the capital felony was committed for pecuniary gain.

In the present matter before this Court, a legal conclusion was reached from the evidence that three aggravating circumstances existed. The evidence was then analyzed by the jury to determine whether the factors in aggravation were sufficiently substantial to warrant a death penalty: G.S. §15A-2000(b).

Thus, the invalidity of one of the aggravating elements had no possible impact upon whether the death penalty could be imposed in this case because there remained two valid aggravating circumstances found by the jury.[2] Either of the two remaining circumstances would properly have served as the basis for consideration of capital punishment in this case. Likewise, the finding of invalidity as to one aggravating circumstance had no practical impact upon whether the death penalty should be imposed since the invalidatating of the one aggravating factor had no effect whatsoever upon the evidence which was before the jury. Since the evidence received in this matter was not rendered inadmissible by the invalidatating of one statutory aggravating element, the North Carolina

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[2]From the evidence, the trial court should also have charged on the statutory aggravating element G.S. §15A-2000(e)(4), that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. This error was, of course, favorable to the petitioner.

3. THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE DEATH PENALTY BE SET ASIDE, WHEN MORE THAN ONE AGGRAVATING CIRCUMSTANCE IS FOUND BY THE JURY TO WARRANT THE IMPOSITION OF THE DEATH PENALTY, BECAUSE ONE AGGRAVATING CIRCUMSTANCE IS SET ASIDE.

LIKEWISE, THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE DEATH PENALTY BE SET ASIDE SIMPLY BECAUSE SOME EVIDENCE ADMITTED DURING THE SENTENCING HEARING WAS IMPROPERLY SUBMITTED.

As his last reason for requesting that certiorari issue to the Supreme Court of North Carolina, the petitioner argues that his constitutional rights to due process and to freedom from cruel and unusual punishment were violated when the North Carolina Supreme Court found that while submission of one of the aggravating factors to the jury was erroneous, the submission constituted harmless error, as did submission of certain evidence during the penalty phase of his trial. These reasons also do not merit the granting of a writ of certiorari.

Unlike Stromberg v. California, 283 U.S. 359, 75 L.E. 1117, 51 S.Ct. 532 (1931) or Williams v. North Carolina, 317 U.S. 287, 87 L.E. 279, 63 S.Ct. 207 (1942), the matter before this Court does not involve one of several possible grounds for conviction proving unconstitutional.[1] Instead, this matter

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[1]See the dissent of Justice White, in the denial of certiorari in Drake v. Zant, 449 U.S. 999 (1980) wherein he stated, at page 1003:

> "The imposition of a death sentence, despite a failure to sustain all of the aggravating circumstances found by the jury, does not conflict with either Stromberg v. California, [supra], or Street v. New York, [supra]. The Georgia Supreme Court has held that under Georgia law it has the power to determine whether or not a death sentence should be imposed under these circumstances. As I see it, this does not violate the United States Constitution.

Supreme Court properly found this to be harmless error beyond a reasonable doubt. Chapman v. California, 365 U.S. 610, 5 L.Ed. 2d 828, 81 S.Ct. 776 (1965). The finding of an aggravating circumstance makes it proper for a jury to consider capital punishment. However, it is the evidence presented both in aggravation and mitigation, not number of aggravating circumstances found, which determines whether the death penalty is appropriate.

The evidence introduced at the penalty phase which petitioner alleged was improperly introduced likewise constitutes harmless error since the bulk of the testimony concerning Taylor's prior crimes and especially his confession detailing them revealed him to have been a fugitive from justice for the last several years with each crime of violence building on the other in his attempts to avoid apprehension as he went back and forth between Virginia and North Carolina. This evidence clearly went to the statutory aggravating offense of committing the capital offense for the purpose of avoiding or preventing a lawful arrest. G.S. §15A-2000(e)(4). See State v. Taylor, ___ N.C. ___, 283 S.E. 2d 779 (1981).

The small quantum of evidence improperly admitted which did not fall within one of the statutory aggravating elements was simply too innocuous compared to the other, properly admitted evidence to be considered other than harmless error: Chapman v. California, supra.

This Court has before it presently the issue which petitioner seeks to raise in this argument in Zant v. Stephens, ___ U.S. ___, cert. granted October 5, 1981. There is no need for this Court to grant its writ in this matter to determine that question.

CONCLUSION

For the foregoing reasons, the State of North Carolina submits that Norris Carlton Taylor's petition for writ of certiorari should be denied.

Respectfully submitted, this 26th day of January, 1982.

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Joan Herre Byers, Assistant Attorney General, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have on this date served a copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI upon the Attorney of Record for Petitioner Norris Carlton Taylor, by depositing same in the United States mail, first class postage prepaid, and properly addressed as follows:

Ms. Mary Ann Tally
Suite 307, 117 Dick Street
Fayetteville, North Carolina 28301

This the 26th day of January, 1982.

Joan Herre Byers
Assistant Attorney General

NO. 81-5962

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NORRIS CARLTON TAYLOR, Petitioner, v. STATE OF NORTH CAROLINA, Respondent.	AFFIDAVIT OF MAILING

STATE OF NORTH CAROLINA

COUNTY OF WAKE

JOAN HERRE BYERS, being sworn, states:

1. I am an Assistant Attorney General for the State of North Carolina representing the Respondent, State of North Carolina.

2. On January 26 , 1982, at approximately 4:00 p.m. EST, I personally placed the original and nine copies of the enclosed Response to Petition for Writ of Certiorari to the Supreme Court of North Carolina in an envelope properly addressed to the Clerk of this Court, with express mail service postage prepaid, and deposited the envelope in a mailbox under the exclusive care and custody of the United States Postal Service within the City of Raleigh, State of North Carolina.

Joan H. Byers

Joan Herre Byers

Sworn to before me this

26th day of January, 1982.

Dianna W. Mashburn (Asst.)

Notary Public

My Comm. Expires: Sept. 23, 1984

DIANNA W. MASHBURN NOTARY PUBLIC CARTERET COUNTY, N.C.